No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.,*

Appellees.

APPELLEES' BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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Statement of the Case.

Appellees accept the appellant's statement of the case, with the following additions:

On January 14, 1943, appellant filed a "Petition for Dismissal" of the Farmer-Debtor Relief Proceedings [Tr. p. 308].

On May 11, 1943, the Commissioner denied said petition for dismissal in its entirety [Tr. p. 309]. No review was taken from this order and it became final.

On September 14, 1943, Citizens National Trust & Savings Bank of Los Angeles, Trustee under Declaration of Trust No. 5873, filed a "Petition for Dismissal" of the Farmer-Debtor Relief proceedings [Tr. pp. 311-312].

On January 29, 1944, the Commissioner, by his order, dismissed the last mentioned petition [Tr. pp. 318-319].

A petition for review of the decision of Commissioner, last referred to, was filed in the United States District Court on February 8, 1944 [Tr. pp. 320-323].

The Review was heard by Honorable J. F. T. O'Connor, United States District Judge, and on August 29, 1944, Judge O'Connor affirmed the order and judgment of the Conciliation Commissioner dismissing the petition of Citizens National Trust & Savings Bank of Los Angeles, Trustee [Tr. p. 324]. No appeal was taken from the order of Judge O'Connor.

In its appeal from the order of the Commissioner, of August 1, 1944, in which the Commissioner determined the existing lien and encumbrances of the appellant on the Debtors' property, the appellant again specified the jurisdictional questions as to the ownership of the property and as to the farmer status of appellees, which had been decided against it by the Commissioner in its order of May 11, 1943, hereinbefore mentioned, and from which it had not petitioned for a review, and asked the Court to dismiss the proceedings on the same jurisdictional grounds [Tr. pp. 43-52]. In its Memorandum of Decision of date November 14, 1946 [Tr. pp. 58-64] the District Court, through Judge Mathes, declined to allow the appellant to again raise the jurisdictional questions, and in its order of November 14, 1946, affirmed the order of the Commissioner, determining the lien and encumbrances of the appellant [Tr. p. 65].

Appellees' Statement of Facts.

Appellees, at this time, respectfully request leave of the Court to present, in an appendix attached to their brief, and which will be referred to under the abbreviated designation "app." an exhibit and certain portions of other exhibits, and certain testimony which they deem essential to a full and proper understanding of the appeal, and all of which has a direct bearing upon arguments and representations of the appellant in appellant's opening brief; and appellees represent that the necessity for presenting the same in printed form was not anticipated at the time of the printing of the transcript of the record herein.

Because of the appellant's incomplete and, in some instances, erroneous statement of facts, which appellees are unable to accept, appellees ask the indulgence of the Court in submitting their own recital of the facts, even though it may be, in some respects, repetitious of the appellant's statement.

The facts are fully and correctly set forth in the Findings of Fact of the Conciliation Commissioner upon the "Petition for Determination of Amount of Existing Lien and Encumbrance" of date August 1, 1944 [Tr. pp. 20-34], and in the Memorandum of Decision of District Judge William C. Mathes, of date November 14, 1946 [Tr. pp. 58-64]. The basic facts, so far as they are set forth in the opinion of the California District Court of Appeal, dated July 28, 1942, in *Hall v. Citizens National Trust & Savings Bank of Los Angeles, et al.*, 53 C. A. (2d) 625, hereinafter mentioned at different times are, as regards the same proof in the Farmer-Debtor proceedings, in accord with those established in the later proceedings.

In 1927, the appellees owned certain ranch property in Leona Valley in Los Angeles County, consisting of approximately 3,000 acres. During that year, the appellees organized Farm Home Builders, Incorporated, a corporation, which they wholly owned and controlled, and to which they transferred the title without consideration, other than an agreed concurrent issuance of stock in said corporation which failed, due to a revocation of the permit for the issuance of the stock. On December 12, 1932, Farm Home Builders executed a re-assignment of all its right, title and interest in the said real property and in Declaration of Trust 5873, hereinafter mentioned, to the appellees. The Citizens National Trust & Savings Bank, as Trustee, never accepted or agreed to said re-assignment [Tr. p. 92].

On July 30, 1927, acting through their corporation, appellees borrowed $45,000.00 from Pan American Bank of California, the indebtedness being evidenced by a five-year promissory note which provided for "interest until paid, at the rate of seven (7%) percent per annum, payable quarterly in advance," and which also contained this provision—"should interest not be so paid, it shall become a part of the principal and thereafter bear like interest" [Petitioner's Exhibit No. 6, a photostatic copy, Tr. pp. 239-244]. This note was secured by a deed of trust, of which Title Insurance and Trust Co. was Trustee, and Pan American Bank, beneficiary. The payment of the note was guaranteed by Phillips and Hambaugh Realty & Construction Company, selling agents, and by the appellees. At the same time, a declaration of trust, to enable the subdivision of the said property and the payment of said note through the sale and release of portions of said property, was entered into between said Farm Home

Builders and said Pan American Bank, in which the said bank acted both as trustee and payee-beneficiary,

Pan American Bank went into liquidation proceedings on July 29, 1929, and the Superintendent of Banks took over the assets and control of the said bank for the purpose of liquidating the same. Thereafter, the Pan American Bank, being in liquidation and thereby incapacitated from continuing to act as trustee of the Declaration of Trust heretofore mentioned, the said original Declaration of Trust was superseded by a new Declaration of Trust, the same being numbered 5873, in which Citizens National Trust & Savings Bank of Los Angeles was named as Trustee, Farm Home Builders as Trustor, and/or beneficiary, Pan American Bank as "First Payee" and Phillips and Hambaugh Realty & Construction Co., selling agents, "Second Payee" [Tr. pp. 275-299], and the purpose of Trust 5873 was to carry on the subdivision and sale of the said property, and to accomplish the objects outlined in the original Declaration of Trust, of which Pan American Bank was both Trustee and payee-beneficiary. Phillips and Hambaugh were subsequently paid in full as "Second Payee," and have no present interest under Declaration of Trust 5873.

On January 7, 1930, the Superintendant of Banks, on behalf of Pan American Bank, executed a grant deed to Citizens National Trust & Savings Bank of Los Angeles, of all its title to the property covered by the Declaration of Trust.

On October 30, 1935, for the purpose of making it possible for Farm Home Builders to sell the individual parcels of real property and thereby ensure the payment of the unpaid obligation to said Pan American Bank, said Declaration of Trust 5873 was amended to reduce the

release prices. This amendment was signed by Farm Home Builders, but not by appellees [Tr. pp. 176-178].

On February 9, 1939, the Declaration of Trust was again amended to further reduce the release prices. It was signed by Farm Home Builders by appellee F. D. Hall, as president, also by the appellees individually, though the appellees were not named as parties to the agreement [Tr. pp. 182-185].

The corporate powers of Farm Home Builders were suspended June 26, 1930, and were not revived until November 22, 1940. The re-assignment from Farm Home Builders to appellees, hereinbefore mentioned, and the two amendments of October 28, 1935 and February 9, 1939 of the Declaration of Trust 5873, all occurred during the period of the suspension of the corporate powers of Farm Home Builders.

On November 2, 1939, in the proceedings in the liquidation of Pan American Bank, the Superintendent of Banks assigned the beneficial interest of Pan American Bank in Trust 5873, to appellant in settlement of a claim of petitioner against Pan American Bank. On November 13, 1939, appellant notified Citizens Bank not to permit sales under the Declaration of Trust (pursuant to the modified release provisions), without appellant's approval, and thereafter, appellant and Citizens Bank refused to approve any sales. On June 4, 1940, appellant directed Citizens Bank to declare all obligations under the Declaration of Trust due and proceed to a trustee's sale. Notice of sale was given on July 3, 1940, and the sale was noticed for November 13, 1940 [Tr. pp. 219-238].

On November 4, 1940, appellees and Farm Home Builders, as plaintiffs, instituted an action in the Superior

Court of Los Angeles County against Citizens Bank, Title Insurance & Trust Co., appellant and others to restrain and enjoin the threatened sale, for a reformation of the Declaration of Trust, for declaratory relief as to the rights of the parties, and for an accounting to determine the amount of the obligation [Tr. pp. 112-138]. Injunctive relief was sought on the theory that the transfer to the appellant, of the note and security, was beyond the jurisdiction of the Court which had approved the sale, and, therefore void, and that the appellant had accordingly received no title to the note and security, and that the effect of the modification agreements had been to extend the maturity of the note, and that the defendants, by their conduct, were estopped from foreclosing and selling, and that the Court should fix a reasonable time for the making of sales by appellees, under the modified release agreement of February 9, 1939. The trial court concluded that appellant had no title to the note and security; also that the defendants were estopped from selling the property, and granted limited and permanent injunctions. The Court declined to make any findings as to the amount due for principal, interest or taxes. (53 C. A. (2d) 629.)

The defendants (including appellant) appealed, and the District Court of Appeal, First District, Division 2, reversed the trial court, but in its opinion, ruled that Farm Home Builders held title to the property as a constructive trustee for the appellees. However, it also ruled that the transfer of the note and security to appellant was valid and not beyond the power of the Court.

Upon the question of "estoppel," the Appellate Court, page 637 of its opinion, said in part, as follows:

> "In support of the findings that appellants are estopped to assert default for periods of twelve months

> and eighteen months, respondents rely upon the amendments of the Declaration of Trust and the notice of November 13, 1939 from Pacific States to Citizens Bank, not to permit sales without the approval of the former. Respondents refer to other 'numerous and varied acts of the parties,' but except for the amendments and notice just referred to, these acts did not amount to more than a mere forbearance. The amendments merely reduced the release prices of the various parcels of the property; it may be that by executing the instruments, the parties waived past defaults, but they cannot, under the guise of an estoppel, be construed to be an extension of the maturity of the note. * * *"

The Supreme Court of California denied a hearing. Shortly after the remittitur had come down, appellees instituted the pending Farmer-Debtor proceedings in the United States District Court, thus superseding the jurisdiction of the State Court. Consequently, there has never been any retrial of the matter in the State Court.

The Commissioner, in his Findings of Fact [Tr. pp. 27-28], found that statements of account had been annually, or more frequently, rendered by Citizens Bank to the interested parties during the years 1933 to 1940 inclusive, and accepted as correct, in which no interest had been added to principal and in each of which statements, Citizens Bank stated without reservation, the unpaid balance of the obligation as of beginning and ending of the accounting period. The Commissioner also found that it was the intention of the Superintendent of Banks, as liquidator of Pan American Bank, to waive interest, and that such interest actually was waived and that the Super-

intendent of Banks would, at all times during which it was liquidator, as aforesaid, have accepted payment of the principal balance, without interest.

[Excerpts from statements App. pp. 1-9; Letter of date March 19, 1936; Debtor's 2-7 App. p. 10; Testimony F. D. Hall, App. pp. 11-16; O. E. Horstman, App. pp. 17-23; C. M. MacFarlane, App. pp. 23-31; A. Q. Robison, App p. 32.]

The Commissioner further found that the said note, by its terms, fell due on July 30, 1932, and that the same was not renewed, extended or revived, and that the note outlawed July 30th, 1936 [Tr. p. 29].

The Commissioner concluded that the note required the compounding of interest at the rate of 7% per annum, payable quarterly to maturity, and to require the payment of simple interest at the rate of seven (7%) per cent per annum for four years from the maturity, and that interest beyond that period was waived by the Special Deputy Superintendent of Banks in charge of the liquidation of Pan American Bank, and that to do equity it was the conclusion of the Court that in addition to the payment of the unpaid principal, interest, as aforementioned, should be added [Tr. pp. 34-37].

Honorable Wm. C. Mathes, in his written Memorandum of Decision [Tr. pp. 58-64], reviewed the contentions of the petitioner (appellant) and found them to be without merit, and his concluding paragraph was as follows:

> "The Commissioner's order is not to be disturbed unless there has been a clear abuse of discretion. I find that the Commissioner acted well within the bounds of his discretion. Therefore, the order of August 1, 1944, will be affirmed" [Tr. p. 64].

During the administration of the estate herein, on July 3, 1943, pursuant to Court order, certain sales of portions of the real property were authorized and consummated, aggregating approximately $49,878.45, which sum less amounts paid to reimburse Citizens Bank for advances to pay taxes, etc. [Tr. pp. 40-41] is being held by the Trustee, subject to Court order. The Commissioner, in his order of August 1, 1944 [Tr. pp. 39-42] directed that the obligation to appellant be paid and satisfied from said fund. The said obligation has not been paid, the appellant having refused to accept the determination of the Commissioner and Honorable Wm. C. Mathes as to the amount of its lien.

Under the heading "Statement of Facts" on page 4 of appellant's opening brief, the following comment relating to the interest of Farm Home Builders under Trust 5873 is made:

> "The only interest of Farm Home Builders thereunder is to receive any sum remaining in the hands of the trustee after first deducting the amounts necessary for the payment of all items shown in the trust."

It has been adjudicated that appellees are the owners of the property, subject only to the liens of the trust deed and Declaration of Trust 5873. Upon satisfaction of the debt and payment of the trustee's fees, appellees will be entitled to the surrender of the note and to a reconveyance from the trustee of the trust deed, and being the only parties left in interest, will also be entitled to demand and receive from Citizens Bank, a reconveyance under Trust 5873, and an assignment of remaining outstanding contracts of sale and to receive any balance of cash on hand in the trust.

The unpaid principal, at the commencement of these proceedings, was $23,921.52, and the interest which was computed and allowed by the Commissioner aggregated $9,912.71, making a total sum payable to Pacific States Corporation of $33,834.23 [Tr. pp. 39-40].

Counsel for appellees will comment at a later and more appropriate time on some of the arguments contained in appellant's Statement of Facts.

Legal Questions Involved.

Based upon the facts as found by the Commissioner upon ample evidence, and affirmed upon review by the District Court, appellees contend that the order determining the lien and encumbrance and the order affirming the same, are proper and correct.

Appellees specifically maintain:

First: That there was a waiver of interest as found by the Commissioner, and the only reason that the Commissioner awarded any interest was because he deemed it equitable to do so.

Second: That without a waiver, simple interest, and not compound, would have been payable after the maturity of the note on July 30, 1932.

Third: There was no extension of the maturity date of the note.

Fourth: That the note was outlawed as of July 30, 1936, and that the same was not revived, (a) by the complaint in *Hall v. Citizens Bank, et al.,* in the

Superior Court, nor (b) by payments applied to principal or interest, nor (c) by the so-called Amendment to Declaration of Trust of date February 9, 1939, nor (d) by any letters written by appellee, Frank D. Hall.

Fifth: That had the debt been revived, it still would not have altered the legal effect of the waiver.

Sixth: That appellant was not a holder in due course, and took the note subject to any infirmities.

Seventh: That the decision of the District Court of Appeal is not *res judicata* as regards the waiver of interest, nor as regards the amount of the debt, nor as regards the application of the Statute of Limitations.

Eighth: That the same equitable right to redeem applies in case of a trust deed, as in the case of a mortgage, whether the debt be outlawed or not.

Ninth: That the jurisdictional questions as to appellees' rights to maintain the Farmer-Debtor proceedings were *res adjudicata* and the District Court properly denied the appellant's petition to dismiss.

Presentation of Argument.

We believe that it will aid the Court if we present our points in the order which follows, rather than by adopting the order of appellant's opening brief. In the argument which hereafter follows, the points raised by appellant will be discussed under the appropriate topical heading. All underscoring, italics and other marks of emphasis are ours, unless otherwise indicated.

ARGUMENT OF THE LAW.

I.

There Was a Waiver of Interest, as Found by the Commissioner, and the Only Reason That the Commissioner Awarded Any Interest Was Because He Deemed It Equitable to Do so.

In this connection, the Commissioner found the following facts [Tr. pp. 27-29]:

> "V. Citizens National Trust and Savings Bank of Los Angeles has acted in its capacity of trustee under the terms of its said declaration of trust No. 5873 since the trust's inception in December, 1929, and up to the present time. It has from time to time entered into contracts of sale as parcels were sold, has collected the installments of the purchase prices as paid, and has executed conveyances as the purchase prices were paid in full; it has applied collections in payment of agents' and beneficiaries' commissions and operating expenses and in payment of principal, and up to January 30, 1932 of interest, on the promissory note obligation, and in the payment of trustee's fees, title and other charges, and has in general performed its duties under the said trust since it accepted the responsibility of trustee.
>
> "During the years 1933 and 1934 it prepared and rendered semi-annual accounts, and in the years 1935, 1936, 1937, 1938, 1939 and 1940, annual accounts of its collections, disbursement and distributions for the respective periods covered by the accounts; each of said accounts set forth a statement of the unpaid balance of the promissory note obligation at the beginning and ending of the accounting period. For the years 1933, 1934, 1935, 1936, 1937 and 1938 the said accounts were furnished to and received by the

Special Deputy Superintendent of Bank of the State of California in charge of liquidation of said Pan-American Bank of California and were at the same time furnished to and received by the debtor, Frank D. Hall. Said accounts were accepted and acted upon by the said debtor and by the said liquidator as true and correct statements of account. For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account.

"None of the said accounts, except the one for 1940, showed the application of any sum to the payment of interest on the said obligation. The acceptance of said accounts indicated an intention on the part of the liquidator of said Pan-American Bank of California to waive interest; and said interest was actually waived by the owner and holder of said promissory note in conjunction with the obligors thereunder. The Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the said liquidator of Pan-American Bank of California, would, at all times during which said liquidator was the owner and holder of said promissory note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from the said liquidator to the said creditor.

"All interest which fell due on the said note was paid until January 30, 1932, the interest for the quarter ending on said date being paid on March 29, 1932. After the last mentioned date no payments were applied by the trustee to interest, except as shown in the 1940 account, where an application is

made by the trustee of one-half of $727.70 to principal, and the other one-half to interest, said sum of $727.70 having been paid by the debtor, Frank D. Hall, to the said liquidator of Pan-American Bank of California, on August 23, 1927, and not having been previously shown on any accounts of the trustee.

"The said note by its terms fell due on July 30, 1932, and the same was not renewed, extended or revived.

"The statutory period for the commencement of an action at law to collect the said promissory note expired July 30, 1936, and at the time the said application was made in the year 1940, of $363.85, towards the payment of interest, the said note was long past due and the obligation outlawed.

"At no time prior to 1942 was any statement prepared or furnished where interest was added to principal to establish a new principal for the calculation of subsequent future interest. In the year 1942, the Citizens National Trust and Savings Bank of Los Angeles, as trustee, at the instigation and by the direction of Pacific States Corporation, prepared a statement in which an attempt was made to re-compute the unpaid obligation represented by the said promissory note and wherein estimated interest was added to principal each quarter from the date of the note to indicate a new principal for the computation of the next quarter's interest, and thereby in effect to compound interest from the date of the note until the date of the statement. The debtors upon receipt of the said re-computation promptly rejected it and challenged the right of the trustee and of Pacific States Corporation to re-compute the obligation.

"VI. In accordance with the accounts prepared and furnished by the Citizens National Trust and

Savings Bank of Los Angeles as trustee under Trust No. 5873, and accepted as correct by the parties in interest at all times prior to the time that Pacific States Corporation acquired the said obligation, and also accepted by the latter corporation as to the accounts, as prepared and furnished in 1939 and 1940, the unpaid balances of the obligation at the respective dates hereinafter mentioned, were as follows:

"On 1-30-32 (the date to which interest was last paid)	$35,600.96
On 4-30-32	34,977.60
On 7-30-32 (the date the note fell due)	34,075.29
On 7-30-36 (the date the note outlawed)	29,355.95
On 12-31-40 (the date of the last unchallenged account)	23,921.52"

As conclusions of law, applicable to this question, the Commissioner found [Tr. pp. 36 and 37]:

"IV. By their conduct Citizens National Trust and Savings Bank of Los Angeles, as trustee of Trust No. 5873, and the liquidator of Pan-American Bank of California, were and are estopped to claim that interest should be allowed beyond a period terminating four years from the maturity of the note, and this estoppel applies to Pacific States Corporation, the successor in interest of Pan-American Bank of California in liquidation.

"V. Since the debtors are in effect asking this Court to determine the amount of the lien on their property in order that they may redeem their property from such lien, it follows, in accordance with the equitable doctrines applicable thereto, that the debtors must do equity, even though the obligation to pay the note in question is barred by the Statute of Limitations, and it is the conclusion of this Court that the obligation to pay the note is barred.

"To do equity in this case, it is the determination of this Court, that the debtors should pay, and the Pacific States Corporation receive, in addition to the unpaid principal of the promissory note, interest at the rate and for the period as provided in Conclusion I. Further, it is the conclusion of this Court that it would be inequitable under the circumstances of this case for the debtors to be compelled to pay interest on the unpaid balance of the note beyond four years from the maturity of the note. In addition, there should be paid all other sums, the payment of which this Court has found to be secured by the lien of the deed of trust and/or by the lien of the said declaration of trust."

The District Judge, in his Memorandum of Decision upon the review proceedings [Tr. pp. 62-63], commented as follows:

"The Commissioner found that Citizens Bank in its capacity as trustee prepared and rendered accounts of all collections, disbursements and distributions during the years 1933-1940 inclusive, and that each account set forth a statement of the unpaid balance of the promissory note obligation; that these accounts did not set forth any charge for or payment of interest; that the accounts were furnished to debtors and to State officials in charge of liquidation of the Pan American Bank and were accepted by them as true and correct; that acceptance of the accounts evidenced an intention on the part of the liquidator of Pan American Bank to waive interest and interest was so waived. As conclusions of law from these findings of fact, the Commissioner held that Citizens Bank, as trustee, and the liquidator of the Pan American Bank were estopped to claim interest after July 30, 1936 and that this estoppel applied to petitioner.

"There is ample evidence to sustain the Commissioner's findings, and there is no error in the conclusions of law drawn therefrom."

The statements of account are Debtors' Exhibit No. 2-4, already referred to. [See excerpts App. pp. 1-9 and excerpt from 1940 Statement, Tr. p. 305].

In addition, on March 19, 1936, Clock, McWhinney & Clock wrote a demand to F. D. Hall (one of appellees), on behalf of the Superintendent of Banks, demanding the payment of the balance of the indebtedness in the sum of $29,356.11, and threatening proceedings if said sum were not paid [Debtors' Exhibit 2-7, App. p. 10]. The statement rendered as of December 31, 1935, showed a balance of $29,355.95 (App. p. 5).

In October, 1942, nearly three years after Pacific States had acquired the note, by direction of Pacific States, the obligation was recomputed, and interest compounded quarterly in advance, to set up a purported unpaid balance as of October 30, 1942, of $55,479.75 instead of $23,921.52, as shown in the statement of 1940 prepared by the Citizens Bank and accepted at that time by Pacific States [Recomputation—Pacific States Exhibit No. 2AA, Tr. pp. 251-266]. Prior to the purported recomputation, no interest except the $363.85 in the 1940 statement had been added.

The attitude of the State Banking Department, as gleaned from and justified by the testimony, is that it was well aware that this note would be difficult to collect because of the deleterious effect of the world depression upon the real estate market, and that it realized that the best results would be obtained from keeping Frank D. Hall, the owner, on the job of selling the ranch off in parcels,

under the subdivision plan. It knew that Hall was better acquainted with the property than anyone else, and had demonstrated his ability to sell in the past. In keeping Hall on the job, and it did so from 1929 to 1939, the Banking Department felt it was serving the best interests of the defunct bank. To enable him to make sales, when to do so was impossible with the release prices as originally fixed, it agreed to a modification of the prices in 1935, and again in 1939. In addition, not only was the State Banking Department satisfied to waive the interest, which is indicated by its acceptance of the Trustee's annual statements and by its one demand made on Mr. Hall, but it was also willing to make a substantial discount in the unpaid principal, as is shown by Hall's testimony.

This was the situation when Pacific States entered the picture and took over in November, 1939. The complexion was immediately changed. Mr. Hall was forthwith forbidden to make sales at the release prices set forth in the agreement of February 9, 1939. Sales that he was prepared to consummate were refused by Pacific States. A default was declared of the obligation, and a demand for immediate payment made. Mr. Hall was unable to comply and sale proceedings were instituted under the power of sale contained in Declaration of Trust No. 5873. It was apparent that Pacific States coveted this unfortunate man's land, and that it was going to get it, whether or no. The litigation in the State courts prevented the trustee's sale in the first instance, and the institution of the Farmer-Debtor proceedings has stalled any further efforts of Pacific States to become the owner by forced sale.

Between 1932 and 1940, there had been no mention of interest, and not until two years later was there any intimation of compound interest. Then, at the instigation of Pacific States, a recomputation of the indebtedness was made to include the compounding of interest quarterly in advance, to arrive at a staggering total of approximately 2.25 times the legitimate and admitted indebtedness. [Pacific States Exhibits No. 2AA; Tr. pp. 251-266.] Needless to say, the exorbitant demand of Pacific States was promptly refused. The Farmer-Debtor proceedings were then instituted.

That the Banking Department's judgment of Mr. Hall's ability as a salesman, and reliance upon his industry and perseverance, was justified, was subsequently demonstrated when, after the inception of the Farmer-Debtor proceedings he, through his own unaided efforts, and an increase in the demand for real estate having arisen, was able to consummate, with the approval of the District Court, sales aggregating approximately $50,000.00, which sum, less sums already mentioned, is held by the trustee subject to Court order [Tr. p. 30].

For the Court's further enlightenment upon the waiver phase, we ask the Court's indulgence to review briefly some of the oral testimony in the case.

Frank D. Hall testified that from February 9, 1939 to February, 1941, he was trying to sell the land; that he had an agreement with the Bank Commissioner to reduce the price and that he had agreed to do everything he could to get money in [Tr. p. 82]; that the Bank Commissioner "was asking me to hurry up and get all the sales I could in there so we could reduce this total, that he could give me good co-operation at all times, and tried

in every way to o.k. all my sales, and got all the help to me that he could so I could make sales and decrease the total amount due" [Tr. p. 82].

> "The Commissioner: You were trying to sell it to pay off the indebtedness? Is that it?
>
> The Witness: Yes, sir, at all times" [Tr. p. 83].

Mr. Hall further testified that during 1939 "I kept advertising and calling on prospects, and spent all my available time that I could possibly put in, running back and forth after people trying to work up business" [Tr. p. 88]. Also, that since 1937, he had spent the larger part of his time endeavoring to work up prospective sales [Tr. p. 90].

From the Transcript, page 97, the following testimony of Mr. Hall is quoted:

> "Q. (By Mr. North) What did you do trying to get the obligation paid up? A. I tried a great many ways to get you paid up, Mr. North.
>
> Q. I asked you, Mr. Hall, what you did in trying to get the obligation paid up? A. I tried to make sales, tried to borrow money."

And from App. p. 11:

> "Q. (By Mr. Von Herzen) That's the portion that you expected to sell the properties, and expected it to bring enough money to pay this indebtedness? A. In 1939, I tried to sell the larger pieces. After talking to Mr. McFaul, and making some arrangements with him, I tried to sell everything I could get peoeple to take hold of, and pay it out.

Q. What do you mean by talking to Mr. McFaul? A. Mr. McFaul was banking commissioner. He told me if I could get $15,000.00 together, he would recommend giving me a complete receipt, for the whole thing, so I tried to make every sale possible."

At this time, the unpaid balance, as shown by the 1938 statement was *$25,549.45.*

And from App. pp. 12-14:

"Q. At or about the year 1939, was there anything transpired between you and Mr. McFaul, that indicated to you that you had to do something to pay off this indebtedness at once? A. (After objection overruled) I went up and had numerous conversations with Mr. McFaul, off and on, and sometime, I would say about the middle of 1939, thereabouts, I had a talk with him. He said, 'We are anxious to get this cleaned up. If I could, I would almost give it to you. I want to get it out of here.' I said 'I will see what I can do. I am pretty sure I can borrow some money.' I had a chance before to borrow some. I went up and told him I could borrow $18,000.00. At that time, he did not want to accept it. He said, 'If you can get $15,000.00, I will try to put the thing through for you, and get it cleaned up,' and he said, 'Let's do it before the first of the year.'

Q. Subsequently, the obligation was transferred by Mr. McFaul to the present holder? A. About the first of November, I thought I would go up and have a further talk with Mr. McFaul, and see what he was planning, and I got up to his office and found Mr. Robison with him.

Q. Do you mean Mr. Robison here in Court? A. Yes."

It was then stipulated that Mr. Robison was originally with the Pan-American Bank; that he was later connected with the office of the Superintendent of Banks and participated in the liquidation of Pan-American Bank until September 1, 1935, and subsequently became identified with the Pacific States.

O. E. Horstmann, called as a witness on behalf of Pacific States, testified that he was an employee of Citizens Bank, and had supervision of Trust 5873, and that the unpaid principal on the note was $23,921.52 (App. p. 17); that the bank had no records which showed the "unpaid balance" shown in the last column of Exhibit 2-AA (the 1942 recomputation from compounding the interest) (App. pp. 19-20); that he had nothing to do with the preparation of that statement, and that the items therein were not reflected in any permanent record of Citizens Bank (App. p. 21); that if Mr. Hall or Mrs. Hall had come to the bank and asked to see the unpaid balance of principal, they would have been shown ledger sheets similar to Exhibit No. 2-10 (which showed no interest added after 1932) (App. pp. 21-22).

C. M. MacFarlane, a witness on behalf of Pacific States, testified that he was assistant trust officer of Citizens Bank, and had had supervision of all accounting in the trust department since 1928 (App. pp. 23, 25). In answer to questions by the Commissioner, he identified a ledger sheet of the bank relating to the $45,000.00 note involved in these proceedings, and showing a purported balance unpaid thereon of $23,921.52, the ledger sheet then being admitted in evidence as Debtors' Exhibit 2-10 (App. pp. 23, 24). The witness also testified that this ledger sheet was a continuation sheet, and that the open-

ing entry of $29,990.49 was the balance of the mortgage on February 18, 1935 (App. p. 26); that the various statements of Trust 5873, represented by Debtors' Exhibit 2-4, were made under his general supervision; that he did not know why interest was not included (App. p. 27); that the one entry of interest $363.85 on the sheet from January 1, 1940, to December 31, 1940, was not part of the account, because the money had never passed through the bank's hands (App. p. 25). Referring to the statement for the period from January 1, 1933 to June 9, 1933 (one of ten comprising Debtors' Exhibit 2-4) and which discloses the unpaid principal as of December 31, 32, as the sum of $33,557.65, the witness was interrogated at length by the Commissioner. The interrogation concluded as follows (App. p. 29):

> "The Commissioner: So that I may understand you, again referring to this figure of $33,557.65—
>
> A. That is a statement of the obligation of Trust 5873.
>
> The Commissioner: To whom?
>
> A. To the Pan-American Bank. An obligation is not set up on the Trustee's books—it is set up when it appears as an asset of another trust. An asset of that trust, trust 5902. The whole of the corpus of trust 5902 consisted of that note, and that is put on merely as a Memorandum entry.
>
> The Commissioner: It is the entire corpus of 5902?
>
> A. Yes.
>
> The Commissioner: So that this balance of $33,557.65 was the unpaid balance of the note which constituted the corpus of 5902?
>
> A. Yes."

Upon the established facts, the Commissioner found that the interest had been waived and the District Court affirmed his finding.

We now proceed to a discussion of the law of waiver, in so far as it is applicable to this proceeding.

The law relative to waiver is well stated in 27 R. C. L. and 25 Cal. Jur.

From 25 Cal. Jur., subject "Waiver," pages 926 to 929, we quote the following:

> "§2. Definitions and Distinctions.—A waiver is the intentional relinquishment of a known right, with knowledge of the facts. While the terms 'waiver' and 'estoppel' (in pais) are sometimes employed indiscriminately, strictly speaking, the former is used to designate the act or the consequence of the act of *one person only,* while the latter is applicable where one's conduct has induced another to take such a position that he will be injured if the first be permitted to repudiate his acts."
>
> "§3. Requisites.—Subject to the rule that there may be a waiver or relinquishment of a claim to something without right, or an unenforceable claim, it is a general doctrine that to constitute a waiver, there must be an existing right, benefit or advantage, a knowledge actual or constructive of its existence; and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It has been held that there must be a meeting of minds and an intentional forbearance to enforce a right. Waiver is a voluntary act and implies an abandonment of a right which can be enforced, or of a privilege which can be exercised—an election to dispense with something of value or to forego

some advantage which one might, at his option, have demanded or insisted upon. It necessarily, therefore, assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right * * *"

"§4. Rights and privileges subject to waiver.—A person may waive any civil right and the benefit of any statute or code provision in respect of his rights and obligations, unless such waiver would be against public policy. Indeed, it is one of the maxims of jurisprudence that 'anyone may waive the advantage of a law intended solely for his benefit' * * *",

and from 27 R. C. L., subject "Waiver," pages 906 and 908:

"§3.—Rights and privileges subject to waiver.—The doctrine of waiver, from its nature is applicable, generally speaking, to all rights or privileges to which a person is legally entitled, whether secured by contract, conferred by statute or guaranteed by the constitution, provided such rights or privileges rest in the individual, and are intended for his sole benefit * * *"

and

"§5.—Requisites.—To constitute a waiver within the definitions already given, it is essential that there be an existing right, benefit or advantage, a knowledge, actual or constructive of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made with a full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them, must plainly appear."

A waiver always rests on intent.

Killian v. Conselho Supremo, etc., 31 C. A. (2d) 497;

Cohen v. Metropolitan Life Ins. Co., 32 C. A. (2d) 337.

Accepting payment of the whole principal as such, waives all claim to interest.

§3290 Civil Code.

In a case of this kind, the waiver rests on Statute, rather than on the intent, as in other cases.

That interest may be waived, see:

Estate of Hein, 32 C. A. (2d) 438, 443,

from which the following quotation is taken:

> "It was held in Jones v. Maria (48 Cal. App. 171) that a person who is in a position to assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such rights. Once such right is waived, it is gone forever. The person who has waived the right will thereafter be precluded from asserting it."

That parties may waive the provisions of the Civil Code—

§3268 Civil Code.

Waiver is a question of fact. See

25 Cal. Jur., subject, "Waiver," p. 932,

where the following text appears:

> "§8.—Province of Court and Jury.—Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury. While some authorities say that waiver is a mixed question of law and fact, each case depending upon its own peculiar circumstances, the only question of law that can be involved relates to the legal definition of the word. For example, a jury may be properly instructed as a matter of law, that a waiver must be voluntary and that it implies a knowledge of the right, claim or thing waived. And yet, whether the waiver was voluntary and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury, except when but one inference can be drawn from the facts."

In the following more recent cases, it was held that "Waiver is a question of fact" to be considered under all the evidence.

Lyons v. Brunswick-Balke Collender Co. (1942), 20 C. (2d) 579; 127 P. (2d) 924;

Schick v. Equitable Life Assur. Soc. (1936), 15 C. A. (2d) 28;

Boyd v. A. E. J. Chivers Co. (1933), 134 C. A. 566, 569.

The Commissioner's finding that there was a waiver of interest is well supported by the testimony, by the circumstances and by the conduct of the parties. There is no merit in appellant's criticisms.

II.

Even Had There Been No Waiver, Simple Interest and Not Compound Would Have Been Payable After the Maturity of the Note on July 30, 1932.

The note involved in this case was for $45,000.00; was dated July 30, 1927, and was payable on or before five years after date and provided for "interest until paid at the rate of seven (7%) per cent per annum, payable quarterly in advance." It also contained this provision—"Should interest not be so paid, it shall become part of the principal and thereafter bear like interest."

It will be noted that *there is no express provision to pay interest after maturity, and no express provision that interest shall become part of the principal after maturity and thereafter bear like interest.*

Certainly the compounding of interest, unless where it is expressly and undeniably agreed to, is not favored.

The following quotations from 30 Am. Jur., subject, "Interest", p. 45, are apropos:

> "Section 55.—Generally—The rule generally recognized is that interest should not bear interest. From an early day, the Courts both in England and in this country have been opposed to the allowance of compound interest, and the enforcement of its payment has been refused on the ground of public policy. In the language of Chancellor Kent, 'Interest on interest promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculations and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to inflame the avarice and harden the heart of the creditor.' But this principle admits of certain

exceptions and modifications, even where ordinary obligations to pay money are involved. Thus, as a general rule, detachable interest coupons bear interest from the date of their maturity, and interest on judgments and decrees in themselves include principal and interest theretofore accrued. The general rule as adduced from authorities, is to the effect that compound interest is not recoverable, unless there has been a settlement between the parties, or a judgment where the aggregate amount of principal and interest is turned into a new principal, or where there is a special agreement to do so, in such a form to be valid."

In 47 C. J. S. "Interest", Section 3(b), p. 15, it is stated:

"The law does not favor compound interest, or interest on interest, and the general rule, subject to some exceptions, is that in the absence of contract or statute authorizing it, compound interest is not allowed to be computed on a debt."

In *Robertson v. Dodson,* 54 C. A. (2d) 661, 665, the Court said:

"(5) Moreover, the compounding of interest has never been looked upon with favor in this State. (Doe v. Vallejo, 29 C. 385; Yndart v. Den, 116 C. 533 [48 Pac. 618, 58 Am. St. Rep. 200]; Schneider v. Turner, 10 C. (2d) 771 [76 P. 2d 668].)

"It should also be noted that the legislature has expressly provided that 'in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest, *unless an agreement to that effect is clearly expressed in writing* and signed by the party to be charged therewith'. (Emphasis ours.) Deering's Gen. Laws (1937), Act 3757, #2; Stats. 1919, p. LXXXIII.)"

Robertson v. Dodson, supra, is followed and quoted from in *State of California v. Day,* 76 C. A. (2d) 536, 554.

It is not denied that in some States, it has been held that the words "until paid" mean until actually paid, whether before or after maturity. In Canada and England, and in several States, including California, it has been interpreted to mean "until maturity."

Perhaps the leading case upon the subject is that of *Puppo v. Larosa,* 194 C. 717. There the note provided *"at the rate of no interest until paid."*

The Court said (p. 720):

> "The promissory note by its terms, bore no interest. The trial court allowed legal interest thereon from the date of maturity. * * * When money is not paid according to the terms of a note, the holder suffers a detriment properly compensable in damages, which Courts have generally adjudged to be the rate of interest agreed upon in the note, if it be within the legal rate (Sec. 3289 C. C.), between maturity and the date of judgment. The fact that the contract provides for no interest has nothing to do with the damages due after the breach of the condition for payment on the due date of the note. Too much importance should not be given to the words 'at the rate of no interest' contained in the note. They import no more than that the defendant agreed to pay the plaintiff, on the maturity of the note, the principal sum of $3,875.00. Some confusion has arisen in this connection because the damages have usually been reckoned in terms of interest; *but interest after maturity* is not according to contract, but by way of damages, and is recoverable as a matter of law when ascertainable. Therefore, the Court has power to determine the damages, which it generally does by allowing legal interest after maturity and up to the

> time of judgment. In such cases there seems to be no good reason under our practice, why judgment may not be given for interest from the maturity or in damages, either mode being proper. * * * The principal amount of the note here sued on 'became due' thirty days after its date. It should bear interest from that date notwithstanding the agreement of the parties that it should not bear interest before it matured. * * *."

Followed in *Nesbit v. McDonald,* 203 C. 219.

Also:

Irvine v. Reclamation District, 24 C. (2d) 468,

and other cases.

In the *Puppo* case, counsel for defendant argued earnestly in his briefs that the words "until paid" meant until the time of payment of the principal whether before or after maturity.

In *United States National Bank v. Waddingham,* 7 Cal. App. 172, where a printed promissory note payable three months after date had the words written therein "without interest until paid" and the note contained the following printed words at the end, "Should not this note be paid at maturity, it shall thereafter bear interest at the rate of two per cent per month", the Court construed the inserted language "without interest until paid" to mean "without interest until maturity."

An examination of cases cited in appellant's opening brief under appellant's point 1A discloses that invariably where the interest was compounded after maturity, the note expressly provided for the compounding of interest after maturity. In this case, as heretofore stated and as now repeated for further emphasis, *there was no express provision for the compounding of interest after maturity.*

It is also, we contend, the law of this State and of other states, that where a Statute such as Section 3289 of the Civil Code of California, provides that "* * * any legal *rate* of interest stipulated by a contract remains chargeable, after a breach thereof as before until the contract is superseded by a verdict, or other new obligation", the word "rate" means the specific percentage specified without reference to the manner of computation.

There is ancient and respected authority in this State for our contention.

In *Raun v. Reynolds,* 11 C. 14, 19, the Supreme Court, in the year 1858, said:

> "According to the common acceptation, the expression 'rate of interest' has reference to the percentage or amount of interest, and not to the manner of computing. Rate is defined by Webster to be 'the price or amount stated or fixed on anything.' That it was used in this sense by the Legislature is, we think, evident from the fact that it was thought necessary that direct authority for the compounding of interest by contract should be given in a separate Section of the Act."

Our contention is further borne out by the language of Section 1916 Civil Code, where it is provided,

> "When a *rate of interest* is prescribed by law or contract, without specifying the period of time for which such rate is to be calculated, it is to be deemed an annual *rate.*"

Clearly the *rate of interest* which the note under consideration bears is 7% per annum, and under Section 3289 Civil Code, it would continue to bear that rate after maturity, and in the absence of an express provision for compounding of interest after maturity, simple interest only would be payable.

III.

There Was No Extension of the Maturity Date of the Note.

In support of this proposition, reference is made to 8 Am. Jur., subject "Bills and Notes", p. 32,

> "#289.—Contract of Extension.—An agreement to extend the time for payment of a negotiable instrument must possess all the elements essential to the execution of a contract. *It must be supported by a good and sufficient consideration and it must be for a definite time and bind the payee to forbear suit and debar the obligor of the right to stop interest by paying the debt during the time of extension.*
>
> "The extension agreement must mutually bind both parties. If the obligor has the right to pay the debt at any time, this mutuality is destroyed and the agreement is not valid * * *." (Citing, Annotation 85 A. L. R. 330.)

Upon this subject, and to the same effect, see 19 Cal. Jur., subject, "Negotiable Instruments", Section 86, page 902.

See also, *Wilmans v. Weissman,* 38 C. A. (2d) 693, where it was held that to support a contract to refrain from commencing proceedings on a note after maturity, a new consideration was necessary.

As already mentioned, the District Court of Appeal, in *Hall v. Citizens National Bank,* 53 C. A. (2d) 629, 637, commented:

> "* * *; It may be that by executing the instruments, the parties waived past defaults, but *they cannot, under the guise of an estoppel, be construed to be an extension of the maturity of the note.*"

It cannot, therefore, be claimed that there was any valid extension of the maturity of the note under discussion.

IV.

The Note Was Outlawed as of July 30, 1936.

The Commissioner so held and the District Judge affirmed [Tr. pp. 29, 63].

The note, dated July 30, 1927, was payable on or before five years from date and thus matured on July 30, 1932. It became barred in four years under Section 337 of the Civil Code. The maturity date was not extended, and the note was not renewed, as shown in our Point III. That the note was not revived will be discussed in subdivisions of this our Point IV.

That Statutes of Limitation are now looked upon with favor, is well recognized and is borne out by the following quotation taken from 16 Cal. Jur., subject, "Limitation of Actions", pp. 394, 395, viz:

> "§5.—Judicial attitude toward Statute. At an early period, after the passage of the English Statute of Limitations, the impression prevailed that limitations were not to be favored, the statute being regarded as a technical means of avoiding a just debt. But now, statutes of limitations are viewed favorably as affording repose and security from stale demands to one who may have lost the ability to procure evidence. As has been said, they are vital to the welfare of society. They have become rules of property. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. A plea of the statute is no longer considered as a technical objection, but as a plea on the merits. The defense of the Statute of Limitations is regarded as a meritorious defense, within the meaning of Section 473 of the Code of Civil Procedure; and a Court may in its discretion permit a pleading to be amended in order to

set up the defense. The statute, when pleaded, will be enforced in all cases which come within its operation, and Courts do not invoke strained constructions to relieve a party from its operation."

Citing:

Lilly Brackett Co. v. Sonneman, 157 C. 192;
San Diego Realty Co. v. McGinn, 7 C. A. 264;
Fontana Land Co. v. Laughlin, 199 C. 625;
D. A. Foley & Co. v. State, 119 C. A. 300.

The attitude of the State of California is further disclosed by the fact that it does not allow claims against the estates of deceased persons, which claims are barred by the Statute of Limitations.

Section 708 of the Probate Code reads:

"No claim which is barred by the Statute of Limitations shall be allowed or approved by the executor or administrator or by the judge."

And too, that barred claims are not favored in bankruptcy, is supported by the following references:

The statute does not require the scheduling of outlawed obligations.

Remington Sec. 574.

The Statute of Limitations may be interposed against the allowance of a claim. The bar of the statute must be pleaded and proved, else it is "waived" and the referee may not of his own motion disallow a claim as barred.

Remington Sec. 958.

It is the Trustee's duty to interpose the bar of the Statute of Limitations.

Remington Sec. 959.

Any creditor may also plead the bar.

Remington Sec. 960.

That scheduling does not revive outlawed debts.

Remington Sec. 962.

In re Wederfield, 277 F. 59, 47 A. B. R. 365, it was said that:

> "The scheduling of a debt barred by the statute does not make it a provable (allowable) claim."

IV (a).

The Debt Was Not Revived by Reason of the Allegations of the Complaint in Hall v. Citizens Bank, et al.

It is argued by counsel in appellant's opening brief, that by virtue of certain allegations in the complaint in the said Superior Court action, which was verified by Frank D. Hall, as an individual plaintiff, that the debt was revived as against Farm Home Builders, the maker of the note. It is our position that it is immaterial who verified the complaint, because under California decisions, the acknowledgment provided for in section 360 C. C. P., must be made direct to the creditor or to someone authorized to contract for him, and that a pleading in a court proceeding is addressed to the Court and not to the creditor.

See:

16 Cal. Jur., subject, "Limitation of Actions", pages 594, 595, Section 191;

Roper v. Smith, 45 C. A. 302;

Biddell v. Brizzolora, 64 C. 354;

Vischer v. Wilbur, 5 C. A. 562;

Estate of Azevedo, 17 C. A. (2d) 710, 712.

In the latter case, it was held that the listing by the administator in the assets of the estate of an outlawed debt which he owed the deceased, did not revive the debt because it was not made to a party authorized to contract on behalf of the estate.

Appellant's point is without merit.

IV (b).

A Payment Alone Does Not Revive a Debt Under Section 360, C. C. P.

Aside from the question of whether the payments collected by the Trustee from the sale of lots, and not directly from the maker of the note, constitute an acknowledgment of the debt, and we are inclined to believe that they do not, there is certainly no new promise to be implied from them, upon which a revival of the debt can be predicated. Furthermore, a part payment by itself does not take the case out of the operation of the Statute of Limitations.

See 16 Cal. Jur., subject, "Limitations of Actions", page 580, from which we now quote:

> "§176.—Part payment.—Although there are a number of decisions which contain language indicating that an acknowledgment may be made by part

payment of principal or interest alone, or that a part payment accompanied by a letter which contains no reference to the debt is sufficient to take a case out of the operation of the Statute of Limitations, it has been pointed out that in the context in each case there was a writing which contained an acknowledgment sufficient to comply with the Statute. It seems to be settled, therefore, that part payment is insufficient for this purpose, unless it is accompanied by a letter or writing which contains a reference to the debt, and which either of itself, or with the aid of permissible evidence of extrinsic facts, amounts to an admission of an existing debt which the debtor is liable for and willing to pay. For example, a check sent in payment of a debt does not meet the requirements of the Statute even though there is a memorandum written on the check-stub in possession of the sender stating its purpose; but if there is a writing accompanying the check, which contains a promise, either expressed or implied, to pay the debt, it is sufficient even though it is necessary to introduce parol evidence to explain the writing."

Citing:

Clunin v. First Fed. Trust Co., 189 C. 248.

In the recent case of *Wilson v. Walters,* 66 C. A. (2d) 1 (1944), the Court said on page 2:

"(1) During the five-year period, the defendant made a series of $25.00 payments on account, commencing September 1937, and ending in March 1939, amounting to a total payment of $450.00 on a judgment for $8,858.75. This fact standing alone would not toll the Statute. (Purdy v. Maree, 31 C. A. (2d) 125 [87 P. (2d) 390].)"

IV (c).

The Amendment to the Declaration of Trust, of Date February 9, 1939, Did Not Revive the Debt.

Opposing counsel, in their opening brief, say again and again that the so-called amendment to Declaration of Trust No. 5873, of date February 9, 1939 [Tr. pp. 182-185], was a sufficient acknowledgment or promise to revive the debt, in conformity with Section 360 C. C. P. This agreement was between Citizens Bank, as Trustee, Farm Home Builders, as Trustor, and/or beneficiary and Pan American Bank in process of liquidation, by John McFaul, Special Deputy Superintendent of Banks, in charge of liquidation. The agreement was not signed on the part of Citizens National. It was signed for Farm Home Builders, Inc., by F. D. Hall, president, but without the corporate seal, and it was signed by John McFaul, as Special Deputy Superintendent of Banks, on behalf of said Pan American Bank in liquidation. In addition, it was signed by the Halls, who were not parties to the amendment, and not parties to Declaration of Trust No. 5873. The signature of the Halls was meaningless and the effect was nothing more than an acknowledgment by them that they knew of the amendment. As to the Farm Home Builders, there being no signature by the secretary and no seal, there is no presumption that the execution of the document was authorized by the directors, and there certainly is no presumption that the president alone could bind the corporation by his signature. We merely wish to say that the contract is vulnerable for these and other reasons.

But aside from the weaknesses mentioned, there is the question of the legal right or power of Farm Home Builders to enter into the contract. The corporation's corpo-

rate powers had been suspended since 1930, and they were not revived until 1940. In 1939, therefore, it was forbidden, under severe penalty, to transact business. (Political Code 3669(c) as then in effect and General Laws, Act 8488—Section 32, as then in effect.) In 1929, the Bank and Franchise Corporation Tax Act (said Act 8488), which had previously provided that every contract made in violation of the Act should be void, had been amended to provide that every such contract should be voidable, and this was the Statute in 1939. Therefore, the amendment to the Declaration of Trust, even assuming that its execution by Farm Home Builders was authorized, was voidable as regards the said corporation. This Statute as to the voidable provision was passed upon judicially in 1936 in *Depner v. Joseph Zukin Blouses,* 13 C. A. (2d) 124, 127, and a petition for hearing was denied by the Supreme Court. In the Appellate Court decision, the opinion on page 127 reads, in part, as follows:

> "(2) A voidable act takes its full and proper legal effect unless and until it is disputed and set aside by some legal tribunal entitled so to do. (Bouvier's Law Dictionary, 3406.) 'Voidable' means subject to be avoided by judicial action of a court of adequate jurisdiction. (8 Words and Phrases 7342.) And a voidable contract is one which is void as to the wrongdoer, but not void as to the wronged party unless he elect to so treat it. (Inlow v. Christy, 187 Pa. 186 (40 Atl. 823).) A voidable contract is one which may be rendered null at the option of one of the parties, and is not void until so rendered. (Meridian Life Ins. Co. v. Dean, 182 Ala. 127 [62 So. 90].)"

In the *Hall* case, within ten days after Pacific States had acquired the note and interest of the Pan American Bank, in November, 1939, it repudiated the amendment by declining to recognize or be bound by it. It refused to allow property to be sold at the new release prices set forth in the agreement. It thereby voided the amendment, and that document has no force or legal effect whatsoever and cannot be used as a medium to revive the Statute of Limitations.

IV (d).

The Debt Was Not Revived by Any Letters Written By Appellee, Frank D. Hall, or by His Attorneys.

It is argued by counsel for appellant that the letter of Frank D. Hall to the Citizens Bank of date August 9, 1942, in which he asked for a statement showing the condition of Trust 5873, revived the debt. [Pacific States Exhibit No. 2G; Tr. p. 273]. It will be noted that the letter contains no promise, and makes no admission of indebtedness. Individually, Mr. Hall is not a party to the Declaration of Trust itself, about which he enquires, and he does not purport to write the letter as a representative of the Farm Home Builders. It is apparent that this letter had no bearing on the running of the Statute of Limitations.

As to the letters written by Goudge, Robinson & Hughes, on behalf of Mr. Hall individually, in September and October, 1942, and being part of Pacific States

Exhibit No. 2A [Tr. pp. 242-250], the same reasoning applies and also the additional objection, that they are controversial and make no admissions whatever, the second letter on page 250 of the transcript containing this statement, viz:

> "It should, of course, be understood that neither by this letter, or otherwise, have our clients admitted any liability whatsoever; and all negotiations have and will be conducted on that understanding."

There are possible further objections (1) the extent of the authority of Mr. Hall's attorneys to bind him in a matter outside an action in Court, and (2) the fact that the letters were not written to the creditor which, at the time written, was Pacific States.

The Citizens Bank was not the creditor and was not capable of itself contracting with Farm Builders, or any other person, in reference to the note. It had no power to extend or renew the note or to alter its terms in any way, and under the cases an acknowledgment to it was of no effect as regards the Statute of Limitations.

Thus, in 16 Cal. Jur., subject "Limitation of Actions," on page 594, the following is stated to be the law, viz.:

> "§190.—* * * In determining whether a person is competent to receive an acknowledgment, a test has been formulated, namely, that the person must be capable of contracting with reference to the subject matter as to which the acknowledgment is made."

Among cases cited:

Visher v. Wilbur, supra;

Roper v. Smith, supra;

In re Azvedo, supra.

V.

Even Had the Debt Been Revived, the Effect of the Waiver Would Have Been the Same.

The law as to the effect of a waiver is tersely stated in 25 Cal. Jur., subject "Waiver," page 930, as follows:

> "§5.—Operation and effect.—A *right which is waived is gone forever,* and the person who waived it thereafter precluded from asserting it. * * *."

Citing: *Jones v. Della Maria,* 48 Cal. App. 171, which was followed in *Estate of Hein,* 32 Cal. App. (2d) 438, already cited in this brief, and other cases.

The debt which could be revived would be the debt as waived—or the original debt less payments and portions waived. In the present case, by reason of the waiver, the question of revival of debt is immaterial.

Counsel assert that the California District Court of Appeal, in its opinion in *Hall v. Citizens Bank, supra,* decided that there was interest in default and that this had the effect of a decree by that Court that there was no waiver of interest. This matter will be treated under our Point VII to follow.

VI.

Appellant Was Not a Holder in Due Course, and Took the Note Subject to All Infirmities.

The Commissioner concluded that Pacific States was not a holder in due course (it having acquired the debt after its maturity) [Conclusion III, Tr. p. 35], and the District Court refused to disturb the Commissioner's order.

As to what constitutes a holder in due course, reference is made to 3133 C. C.,—one of the requirements being that the holder must have acquired it before it was overdue.

Section 3139 C. C. provides that

> "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable."

Our Point V was to the effect that there was no extension of the maturity date of the note, or renewal thereof, which date of maturity was July 30, 1932. The note, having matured July 30, 1932, and having been overdue since that time, Pacific States which acquired it long after its maturity, is not a holder in due course, and in its hands, the note is subject to all defenses that could have been urged against Pan American Bank, the original holder, and the State Banking Department, as representing Pan American Bank in liquidation.

VII.

The Decision of the District Court of Appeals is Not Res Adjudicata.

Counsel for appellant contend in their Point III that the judgment in the case of *Hall v. Citizens National Bank,* 53 C. A. (2d) 625, is *res judicata,* that the obligation of appellees was valid and existing under the Declaration of Trust and the deed of trust, on November 4, 1940, and that the appellant had not waived and was not estopped from enforcing the same.

The truth is, that the District Court of Appeal wrote an opinion, and reversed the trial court. This opinion is not, as we understand it, a judgment, but in a second trial would be the law of the case on the same evidence and facts as in the first trial. When the trial court is reversed, as here, the judgment is set aside and there is no judgment until after another trial.

Thus in Agricultural Pro-rate Commission, 39 F. Supp. 937, it was held that the parties on a reversal, stand in the same position as if no judgment had been rendered.

And in *Reidy v. Bidwell,* 93 C. A. 202, 269 P. 682, it was held that when the Court, in reversing a case, merely orders "The Judgment is reversed," the effect of such an unqualified reversal is to remand the case for a new trial upon all the issues presented by the pleadings.

To the same effect, see

De Hart v. Allen (1945), 26 C. (2d) 829;

Monson v. Fischer, 219 C. 290;

Central Savings Bank v. Lake, 201 C. 438;

Thomas v. Lavery, 125 C. A. 666,

also 2 Cal. Jur., subject "Appeal and Error," page 996, where the following language is used:

> "§590. Effect of Reversal. To reverse is to overthrow, set aside, make void, annul, repeal, revoke or vacate. When a judgment or order is reversed, it is entirely reversed, and is without validity or force. The proceeding is left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever been rendered or made."

For this reason, the doctrine of *res adjudicata* has no application in this case.

It is worthy of comment, that in this *Hall* case, the trial court declined to pass upon the questions that were involved in the determination of the lien before the Commissioner, that is to say: (1) the amount of the debt; (2) whether the note provided for interest after maturity; (3) whether interest had been waived, and (4) whether the debt was outlawed, and it therefore follows that there has been no previous judgment on those matters, either by a trial courtt or by an appellate court.

VIII.

The Same Equitable Right to Redeem Applies in Case of a Trust Deed, as in the Case of a Mortgage, Whether the Debt Be Outlawed or Not.

The equitable doctrine, that he who seeks equity must do equity, is applicable to mortgagors and to trustors under trust deeds who seek to redeem.

As to the general doctrine, see

> 10 Cal. Jur., subject "Equity," Section 50, pp. 508-511.

As to its application to mortgagors, see

> 10 Cal. Jur., subject "Equity," Section 52, pp. 512-513,

from which we quote:

> "Pursuant to the maxim that he who seeks equity must do equity, it is settled in California, that a mortgagor cannot quiet his title against the mortgagee, without paying the debt secured though it is barred by limitations. * * * So the fact that the debt is barred by limitations does not absolve a mortgagor from payment when he wishes to redeem his property."

See numerous cases cited, including:

> *Shimpones v. Stickney,* 219 C. 637.

That the doctrine is as applicable to the trustor under a trust deed as to a mortgagor under a mortgage, see:

> *Meetz v. Mohr,* 141 C. 667;
>
> *Toule v. Santa Cruz County Title Co.,* 20 C. A. (2d) 495;
>
> *Dool v. First National Bank,* 207 C. 347.

Notwithstanding Section 2911 of the Civil Code that a lien is extinguished with the debt which it secures, a pledgor or mortgagor cannot recover his property without paying his debt. This is clearly established in *Puckhabor v. Henry,* 152 C. 419, which is also a leading case upon the conditions in California which a mortgagor or trustor must comply with in order to redeem or quiet title.

As to redemption from lien—how made.

Sec. 2905 Civil Code provides:

> "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

See, also, 18 Cal. Jur., subject "Mortgages," Section 513, pages 225-226.

As to "Definition, Nature and Effect" of Trust Deeds, see 25 Cal. Jur., subject "Trust Deeds," Section 3, page 9, where it is said:

> "* * *. Such a deed is distinct from a mortgage—though, as has been observed, in some cases, it is difficult in principle to distiguish them. But, like a mortgage, a trust deed is a mere security, its primary purpose being to secure the payment of a debt, or the performance of some act. Accordingly, a trust deed has been said to be practically, though not in legal effect, little more than a mortgage with power to sell and convey * * *."

In *Boyce v. Fisk,* 110 C. 107, which was an action to quiet title, as against a mortgage, the Court said (p. 113):

> "The fact that his debt is barred by the Statute of Limitations does not absolve the mortgagor, who would redeem the property, from paying the debt. The moral obligation remains and rests upon the mortgagor, who would redeem to pay, as a condition thereof, the sum of money which the mortgagee could have recovered but for the bar of the Statute."

In that case, the unfortunate mortgagor had contracted to pay *4% per month, compounded monthly after maturity* until paid. The Court compounded the interest for four years, or until the outlaw date, and then added straight simple legal interest for the time that the debt had been debarred. In other words, this was what the Court deemed equitable in *Boyce v. Fisk.* The Conciliation Commissioner in view of the waiver in the present case, allowed compound interest to date of maturity—then simple interest at *7%,* which was the rate provided in the note, until the date of outlaw, and no interest (or damages) from that date. This was the conclusion of the Conciliation Commissioner as to what was equitable under the circumstances. The amount allowed in view of the waiver and other facts, was eminently fair to Pacific States Corporation.

We do not question the authorities, such as *Bank of Italy National Trust & Savings Bank v. Bentley,* 217 C. 644, and others cited by opposition counsel, that the right of a trustee to sell under the sale powers contained in a trust deed is not subject to any Statute of Limitations, even though the debt will become barred in four years,

and even though the right to foreclose a trust deed in a court action may also be barred. We deny that the fact that the time of sale may be delayed extends the maturity of the note. We say that the beneficiary, after the debt is outlawed, is not entitled to damages for the outlaw period, other than such as may be assessed by the Court.

That an action to redeem the property from a trust deed will lie, we refer to 25 Cal. Jur., subject "Trust Deeds," page 65, and quote as follows:

> "§50. Actions to Determine Claim to Reconveyance and to Redeem. Under section 1050 of the Code of Civil Procedure, authorizing one to bring an action against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation, the beneficiary in a trust deed may maintain an action to have the validity of his security determined where the debtor claims a right to a reconveyance without the payment of any sum, or upon payment of less than the amount actually secured.
>
> Action to redeem.—It has been observed that an action for an accounting of proceedings under a declaration of trust and for a reconveyance on payment of the amount found due is in substance and effect an action to redeem the property from the liens secured by the deed of trust. In such action the proper decree is that the debtor within a fixed time pay the amount found due and that the trustee, upon receipt or tender to him of such amount, make, execute and deliver a good and sufficient deed of conveyance of the title held by him in trust of the premises, and, on failure to pay or tender such sums within the time prescribed, that the debtor be barred of all further right or claim to redeem."

IX.

That the Jurisdictional Questions as to Appellees' Rights to Maintain the Farmer-Debtor Proceedings Were Res Adjudicata and the District Court Properly Denied the Appellant's Petition to Dismiss.

Appellant's point V (Op. Br. p. 50) apparently is that since title to the real property in question had been transferred to a corporation wholly owned by appellees, appellees were technically not the owners of the land and hence did not have sufficient interest therein to commence the proceedings under section 75.

However, contrary to the assertions in the brief that, "This issue was first placed before the Court on the petition for review from the order of the Conciliation Commissioner of August 1, 1944" (Br. p. 55), the matter was considered by the Conciliation Commissioner on two different occasions *prior* to the order from which the present appeal has been taken, and it was also considered by the District Court in a proceeding from which no appeal was taken.

On January 14, 1943, Pacific States Corporation filed a "Petition for Dismissal" of the proceedings [Tr. p. 308]. The first ground was that neither of the present appellees were farmers within the intendment of the statute, and the second ground was that "neither Frank D. Hall nor Marguerite S. Hall, is the owner of any of the property particularly described in Schedule BI of the original petition filed herein . . ." On May 11, 1943, the Commissioner denied said petition in its entirety, stating, *inter*

alia, "that he found said debtors, Frank D. Hall and Marguerite S. Hall, to be farmers within the meaning of subsection 'r' of section 75 of the Bankruptcy Act, *and also to be the owners of the real property* described in the schedules attached to their petition . . ." [Tr. p. 309, emphasis added.] No review was taken from this order, and it became final [See Tr. p. 316].

The same matter was again urged upon the Commissioner in a "Petition for Dismissal" filed September 14, 1943, by the trustee under the deed of trust [Tr. p. 311]. Among the allegations of the petition, the following appears: "That neither of the above named debtors is the owner of any of the property hereinabove referred to, or any part or portion thereof, and any interest which they or either of them may have in said trust consists only of a right to receive proceeds therefrom if the terms and conditions of said trust have been performed and complied with, and neither of said debtors has any present interest in the said property." This petition was accompanied by a "Notice of Motion to Strike from Petition and Schedules" containing the statement that, "said motion to be based upon the ground that neither of said debtors is a farmer and upon the further ground that said debtors, or either of them, do not own said real property or any part or portion thereof." The order dismissing the petition and denying a motion to strike recites that not only the moving trustee appeared, but also that the "creditor, Pacific States Corporation" appeared by its counsel [Tr. p. 318]. A petition for review of this order was heard by the Honorable J. F. T. O'Connor, District Judge, and said order was affirmed on August 29, 1944 [Tr. p. 324]. No appeal was taken from said order of the District Court, and it is now

final. The appeal presently before the Court is from an order of the District Court entered November 14, 1946, which was made upon review of an order of the Commissioner dated August 1, 1944, upon a "Petition for Determination of Amount of Existing Lien and Encumbrance" and "Petition for Order to Apply Moneys to Payment of Debt" [Tr. pp. 39, 65].

Appellant apparently concedes that the question whether or not the debtors are farmers is not now open to review as such issue was "previously before the court" (Br. p. 55). He appears to have overlooked the fact that the question he now attempts to raise was also before the Court and passed upon at the same time as the issue relating to whether or not the debtors were farmers.

Regardless of whether he concedes it or not, it is respectfully submitted that the issue which appellant now attempts to raise under this point has been previously decided in this case and the time for review and appeal having passed, is now *res judicata. Stoll v. Gottlieb,* 305 U. S. 165, 170-172, 83 Law Ed. 104, 107, 108; *Henderson v. Denious,* 186 Fed. 100; *Stearns Salt & Lumber Co. v. Hammond,* 217 Fed. 559; *Lewith v. Irving Trust Co.,* 67 F. (2d) 855; *In re Sterling* (9 Circ.), 125 F. (2d) 104. Perhaps appellant may argue that the question raised is jurisdictional and may be urged at any time. Such an argument is and would not be valid. The issue sought to be resurrected was specifically urged upon the Commissioner on two occasions, appellant being present

in each instance, and was urged upon the District Court one one occasion prior to the ruling from which the present appeal has been taken. There would be no end to litigation if disappointed parties could raise the same question any number of times and still be entitled to be heard thereon. In the case of *In re Sterling, supra,* this Court speaking through Circuit Judge Mathews, said:

> "The question of the Court's jurisdiction to grant the injunction was raised by Bolsa Chica at the first hearing before the referee and was determined adversely to Bolsa Chica's contention by the referee's order of May 15, 1940. No review of the referee's order was sought or obtained. The time within which such review might have been sought expired long before the contempt certificate was filed. As to Bolsa Chica, therefore, the referee's order was and is conclusive; for *the principles of res judicata apply as well to jurisdictional questions as to other questions,* as well to bankruptcy cases as to other cases, and as well to decisions of referees as to those of judges." (Emphasis added, citations omitted.)

To the same effect:

> *Arizona Power Corporation v. Smith* (9 Circ.), 119 F. (2d) 888.

Although we believe the appellant's contention here made has no substance as far as its merits are concerned, it does not, in view of the foregoing, appear to be necessary to discuss it further.

Sundry Other Matters.

Appellant's Point II (Op. Br. p. 28) is that Equity requires the payment to the appellant of interest from and after the filing of the petition. This is an astonishing suggestion, considering the facts.

The Commissioner has found that interest was waived and that the debt was barred as of July 30, 1936. The Commissioner determined the amount of the debt secured by the lien of the trust deed, and ordered it paid from the moneys received from certain sales authorized by the District Court. The Commissioner also decreed that the note be cancelled, and that the trust deed and Declaration of Trust be likewise cancelled, and that all be delivered to the Court, and that the trustees execute full reconveyances in favor of the debtors [Order dated August 1, 1944, Tr. pp. 41-2].

The payment of the amount set by the Commissioner was refused by Pacific States which petitioned for a Review in the District Court, and then took this appeal.

The sales money, approximately $50,000.00 less certain sums disbursed therefrom as provides in the Commissioner's order and hereinbefore mentioned, has remained in the joint custody of the Commissioner and the Citizens Bank (Trustee). Of that deposit, $33,834.23 belongs to Pacific States, upon its compliance with the Commissioner's Order, and Pacific States alone is responsible for the non-delivery of said money.

Section 1504 of the Civil Code reads:

> "An offer of payment or other performance duly made, though the title of the thing offered be not transferred to the creditor, stops the running of in-

terest on the obligation, and has the same effect on all incidents as a performance thereof."

This would dispose of any right of Pacific States to claim interest after August 1, 1944, and under the findings of the Commissioner, that interest had been waived and that the debt was outlawed on July 30, 1936, and that Pacific States was not in equity entitled to interest after that date, there would not appear to be any justifiable basis for allowance of the extra "interest" claimed by Pacific States.

Appellant intimates that because appellees offered $50,000.00 in a composition and extension proposal [Tr. p. 73], which was refused by appellant, and because the debtors' estate is now worth that sum or more, appellant should be awarded at least that sum. There is no basis in law or the bankruptcy procedure for such claim by appellant.

An offer of compromise which is refused is of no force or effect, and is not even evidence.

Appellant's counsel state, on page 58 of the opening brief, that appellees have had the free use of $33,834.23 for more than eleven years. This is not true. The reason appellant has not had the use of said sum since it was determined to be the amount of its claim is because it would not accept same, and clearly, the appellees have had no use of the said $33,834.23 since it has been impounded with the trustee, nor any use of the excess money in the trustee's hands, which rightfully belongs to the appellees.

Appellant's counsel are also in error when they state that the testimony shows that appellees total assets available to satisfy the claim are $129,878.38 (Opponent's Br.

pp. 28-29); also in error in the statement on page 29 that the remaining 760 acres are worth $80,000.00. There is no testimony to sustain these figures.

While the value of the assets may not be material, we would like at least to keep the record straight as to the testimony on this matter.

F. D. Hall testified on February 11, 1943, that the residue of property was worth about $80,000.00, and Mr. North (appellant's attorney) that appelllant believed it to be worth about $50,000.00 or $55,000.00 [App. pp. 14-15].

This testimony was given before there were any sales to bring in some $50,000.00 cash.

On February 11, 1943, Mr. Hall also testified that the original ranch comprised 1,320 acres, which he acquired in 1915, and that within a year after, he purchased 1,560 more acres [App. p. 14].

On February 19, 1943, Mr. Hall testified that he had, at that time, sales which he could make aggregating about $50,000.00, and that when made, he would have 700 or 750 acres left, and that what was left would have, in his estimation, a value of from $30,000.00 to $35,000.00 [App. pp. 15-16]. The testimony is clear and understandable. The estimated gross value, according to Mr. Hall, of his property, was $80,000.00 to $85,000.00, before the sales which yielded $50,000.00, and the appellant, according to its attorney, at that time estimated the gross value to be $50,000.00 before the sales. It must be remembered also, that at that time Citizens Bank had a prior lien for reimbursement of a sum in excess of $6500.00, which it had advanced to pay delinquent taxes [Tr. p. 40].

The value of $129,878.38 set forth in appellant's opening brief is fictitious.

Conclusion.

Appellees maintain that the findings of fact are amply supported by the great weight of the credible evidence; that the conclusions of law are consistent throughout with the findings; that the order determining the lien of the appellant is equitable and fair to appellant, and entirely in accord with the findings of fact and conclusions of law; and appellees maintain that the grounds of appeal of the appellant are wholly lacking in merit.

Wherefore, appellees pray this Court to deny the appeal of the appellant and to affirm the order of the Commissioner and the decree of the District Court affirming that order.

Respectfully submitted,

C. P. Von Herzen,
Edgar F. Hughes,
David A. Sondel,
Attorneys for Appellees.

APPENDIX.

[Debtors' Exhibit No. 2-4 (Portion only)]

Trust Department
Citizens National Trust & Savings Bank
of Los Angeles

Statement

ust Name Farm Home Builders, Inc.

ust No. 5873 Trust Account Statement of Release Obligation in Favor of Pan American Bank — From 1/1/33 To 5/9/33 Incl.

	12/31/32 Unpaid principal balance		33,557.65
33			
16	*Pain* on principal	447.33	
		447.33	33,557.65
	Unpaid balance 5/9/33	33,110.32	
		33,557.65	33,557.65

[Debtors' Exhibit No. 2-4 (Portion only)]

Trust Department
Citizens National Trust & Savings Bank
of Los Angeles

Statement

ust Name Farm Home Builders, Inc.

ust No. 5873 Trust Account as indicated — From 9/6/33 To 12/31/33 Incl.

ate

		Dr.	Cr.
	n American Bank, Release Account:		
	Balance as per previous statement		432.04
/8	Transferred to Pan American Bank, Trust 5902, a/c funds available to apply on principal of Farm Home Builders, Inc. note	432.04	

12/31	Collections applicable for period 9/6/33 to 12/31/33 inclusive: Principal		451.30
		432.04	883.34
	Balance remaining in Account		451.30

(letter "S" it typewritten

STATEMENT OF RELEASE OBLIGATION

IN FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance as per previous statement	31,847.50
9/8	On account of principal	432.04
12/31	Unpaid Balance	$31,415.46 S

(letter "S" r typewritten

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.

Trust No. 5873 Trust Account as indicated From 1/1/34 To 5/31/34 In Date

		Dr.	Cr.
	PAN AMERICAN BANK—RELEASE ACCOUNT:		
	Balance as per previous statement		451.30
2/26	Transferred to Pan American Bank, Trust 5902 a/c funds available to apply on principal of Farm Home Builders Note	451.30	
5/31	Collections applicable for period 1/1/34 to 5/31/34 inclusive		667.45
		451.30	1118.75
	Balance remaining in Account		667.45

(letter "S" r typewritten

ATEMENT OF RELEASE OBLIGATION
FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance per previous statement	31,415.46
6/34	On account of principal	451.30
	Unpaid Balance, 5/31/34	30,964.16 S

(letter "S" not typewritten)

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

ust Name FARM HOME BUILDERS, INC.

ust No. 5873 Trust Account as indicated From 6/1/34 To 12/31/34 Incl.
ite

			Dr.	Cr.
HILLIPS AND HAMBAUGH, AGENTS:				
	Balance as per previous statement			770.39
/31	Collections applicable for period 6/1/34 to 12/31/34 inclusive:			
	Interest	1.28		
	Principal	34.14		35.42
	Collection fee for period 6/1/34 to 12/31/34 incl:			
	5% on $285.48	14.27		
	3% on 360.10	10.80	25.07	
	Less 95% chargeable to General Trust Acct.	23.82	1.25	
			1.25	805.81
	Balance remaining in Account			804.56 S

(letter "S" not typewritten)

PAN AMERICAN BANK—RELEASE ACCOUNT:			
	Balance as per previous statement		667.45
6/18	Transferred to Trust 5902, Pan American Bank, a/c funds available to apply on principal of Farm Home Builders note	667.45	
12/31	Collections applicable for period 6/1/34 to 12/31/34 inclusive		306.22
		667.45	973.67
	Balance remaining in Account		306.22

(letter "S" it typewritten

STATEMENT OF RELEASE OBLIGATION IN FAVOR OF PAN AMERICAN BANK:		
	Unpaid Balance, as per previous statement	$30,964.16
6/18	On account of principal	667.45
	Unpaid Balance, 12/31/34	$30,296.71

(letter "S" it typewritten

[DEBTORS' EXHIBIT No. 2-4 (Portion only)]

Trust Department
CITIZENS NATIONAL TRUST & SAVINGS BANK
of Los Angeles

STATEMENT

Trust Name FARM HOME BUILDERS, INC.
Trust No. 5873 Trust Account as indicated From 1/1/35 To 12/31/35 In.

Date		Dr.	Cr.
PAN AMERICAN BANK—RELEASE ACCOUNT:			
	Balance as per previous statement		306.22
2/16	To Pan American Bank, Trust 5902, a/c funds available to apply on principal of Farm Home Builders note	306.22	
12/31	Collections applicable for period 1/1/35 to 12/31/35 inclusive:		634.54
		306.22	940.76
	Balance remaining in Account		634.54

'ATEMENT OF RELEASE OBLIGATION
FAVOR OF PAN AMERICAN BANK:

	Unpaid Balance, as per previous statement		$30,296.71	
/18	To Pan American Bank, Trust 5902, to apply on principal		306.22	
	Unpaid Balance, Dec. 31, 1935		$29,990.49	
	(not typewritten).....3/10/36		634.54	(not typewritten)
			$29,355.95	(not typewritten)

HILLIPS AND HAMBAUGH, AGENTS:

	Balance as per previous statement			804.56
/31	Collections for period 1/1/35 to 12/31/35 inclusive:			
	Interest	.12		
	Principal	7.13		7.25
	Collection fee for above period:			
	3% on $616.16 or	$18.48		
	5% on 512.91 or	25.65	44.13	
	1129.07 (not typewritten)			
	Less: 99% chargeable to General Trust Acct.		43.69	.44
			.44	811.81
	Balance remaining in Account			811.37

[Debtors' Exhibit No. 2-4 (Portion only)]

Trust Department
Citizens National Trust & Savings Bank
of Los Angeles

Statement

Trust Name Farm Home Builders, Inc.

Trust No. 5873 Trust Account as indicated From 1/1/36 To 12/31/36 Inc

Date		Dr.	Cr.
	Pan American Bank—Release Account:		
	Balance as per previous statement		634.54
3/10	To Trust 5902, Pan American Bank, a/c funds available to apply on principal of Farm Home Builders note	634.54	
12/31	Collections applicable for period of this statement		900.14
		634.54	1534.68
	Balance remaining in Account		900.14
	Statement of Release Obligation		
	In Favor of Pan American Bank:		
	Unpaid Balance, per previous statement	$29,990.49	900.14
3/10/36	Paid a/c principal	634.54	(not typewritten)
	Unpaid Balance, Dec. 31, 1936	$29,355.95	
	Phillips and Hambaugh, Agents:		
	Balance as per previous statement:		811.37
12/31	Collections applicable to this account for period of this statement:		
	Interest .68		
	Principal .69		
	Difference .01		
		.01	811.37
	Balance remaining in Account		811.36

28,455.81
(not typewritten)

[Debtors' Exhibit No. 2-4 (Portion only)]

Trust Department
Citizens National Trust & Savings Bank
of Los Angeles

Statement

Trust Name Farm Home Builders, Inc.
Trust No. 5873 Trust Account General Trust From 1/1/37 To 12/31/37 Incl.
(continued)

1937			Disbursements	Receipts
12/31	Collections applicable to this account for period 1/1/37 to 12/31/37 inclusive:			
	Interest	345.94		
	Principal	124.95		470.89
12/31	Trustee's Minimum annual fee, year 1937		300.00	
			382.84	789.48
	Balance remaining in Account			406.64
	Pan American Bank—Release Account:			
	Cash Balance, 12/31/36			900.14
5/4	To Trust 5902, Pan American Bank: Funds available to apply on principal of Farm Home Builders note		900.14	
12/31	Collections applicable to this account for the period of this statement			952.41
12/31	To Trust 5902, Pan American Bank: Funds available to apply on principal of Farm Home Builders note		952.41	
			1852.55	1852.55
	Balance remaining in Account			—o—

Statement of Release Obligation
In Favor of Pan American Bank:

	Unpaid Balance, per previous statement		$29,355.95
5/4/37	Paid a/c principal	900.14	
12/31/37	" " "	952.41	1,852.55
	Balance, 12/31/37		$27,503.40

[Debtors' Exhibit No. 2-4 (Portion only)]

Trust Department
Citizens National Trust & Savings Bank
of Los Angeles

Statement

Trust Name Farm Home Builders, Inc.

Trust No. 5873 Trust Account as indicated From 1/1/38 To 12/31/38 Incl.

Pan American Bank—Release Account:

1938		Disbursements	Receipts
	Cash Balance, 12/31/37		—o—
10/22	To give effect to funds paid to and held by John McFaul, Special Deputy Superintendent of Banks, as per receipt dated 10/14/38	732.00	
10/22	By General Trust Account: transfer of funds per authorization of F. D. Hall, dated 10/18/38		169.34
12/31	By collections applicable to this account period 1/1/38 to 12/31/38 inclusive:		1,784.61
	To Trust 5902, Pan American Bank: funds available to apply on principal of Farm Home Builders note	1,221.95	
		1953.95	1953.95
	Cash Balance, 12/31/38		—o—

Statement of Release Obligation
In Favor of Pan American Bank:

	Unpaid Balance, 12/31/37		$27,503.40
12/31/38	Paid A/c principal	1,221.95	
10/22/38	Paid a/c principal	732.00*	1,953.95
	Unpaid Balance, 12/31/38		$25,549.45

*Paid direct to Supt. of Banks, per advice 10/14/38

[Debtors' Exhibit No. 2-4 (Portion only)]

Trust Department
Citizens National Trust & Savings Bank
of Los Angeles

Statement

Trust Name Farm Home Builders, Inc.

Trust No. 5873 Trust Account as indicated From 1-1-39 To 12-31-39 Incl.

Pan American Bank—Release Account:

1939		Disbursements	Receipts
1–1	Cash Balance per previous statement		—o—
3–20	Transfer to General Trust Account to apply on taxes	$ 194.38	
3–31	Transfer to General Trust Account reversing fund transferred to this account 10-22-38	169.34	
	Collections applicable to this account for the period 1-1-39 to 12-31-39 incl.		$1,627.80
		$ 363.72	$1,627.80
	Cash Balance December 31, 1939	1,264.08	
		$1,627.80	$1,627.80

Statement of Release Obligation
In Favor of Pan American Bank:

(now The Pacific States Corporation)

Unpaid balance 12-31-38	$25,549.45

No payments made during above period

DEBTORS' EXHIBIT No. 2-7.

Law Offices
CLOCK, McWHINNEY & CLOCK
1012 Ctizens National Bank Bldg.
Los Angeles, California
MUtual 3157
March 19, 1936

File No. .....

On the subject of this letter address Walter Desmond. Jr. 1012 Citizens Nat'l Bank Bldg. Los Angeles, Calif.
Mr. F. D. Hall
Leona Valley, via
Palmdale, California

Dear Sir:

We are attorneys for the Superintendent of Banks in charge of the liquidation of the Pan American Bank. Mr. John McFaul, Special Deputy Superintendent of Banks in charge of the Pan American Bank has handed to us your promissory note, dated July 30, 1927 in favor of said Pan American Bank, upon which there is a balance due of $29,356.11, with instructions to file foreclosure proceedings immediately.

This is to advise you that unless this obligation has been paid within one week from today, foreclosure proceedings will be instituted against you.

Kindly advise us your attitude in this matter.

Yours very truly,
CLOCK, McWHINNEY & CLOCK
By Walter Desmond, Jr.
Walter Desmond, Jr.

Debtors' 2-7
LC

Debtors' "A"
Hearing of Jan. 20, 1943

TESTIMONY OF FRANK D. HALL.

Cross-Examination.

By Mr. Von Herzen, February 11, 1943. [Rep. Tr. p. 293.]

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[Rep. Tr. p. 299, line 10, to p. 300, line 14]:

"Q. By Mr. Von Herzen: In other words, if it were necessary to sell, or you were able to sell, any portion of the west to pay this indebtedness, you would have, that is correct, is it not? A. Yes.

Q. The portion that you concentrated on selling was the portion to the east, is that correct? A. Yes.

Q. That's the portion that you expected to sell the properties, and expected it to bring enough money to pay this indebtedness? A. In 1939 I tried to sell the larger pieces. After talking to Mr. McFaul, and making some arrangements with him, I tried to sell everything I could get people to take hold of, and pay it out.

Q. What do you mean by talking to Mr. McFaul? A. Mr. McFaul was banking Commissioner. He told me if I could get $15,000.00 together he would recommend giving me a complete receipt, for the whole thing, so I tried to make every sale possible.

Mr. North: I object to that as imcompetent, irrelevant and immaterial. A. So I thought I could borrow some money. I had some contracts which looked good, and I could get some money from sales, so I tried in 1939 to make some connections—

The Commissioner: Just a minute. You were interrupting the witness, Mr. North?

Mr. North: Yes.

The Commissioner: Do you wish to make a motion to strike the testimony?

Mr. North: No, I am going to leave it alone."

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[Rep. Tr. p. 301, line 10, to p. 304, line 3]:

"Q. At or about the year 1939 was there anything transpired between you and Mr. McFaul that indicated to you that you had to do something to pay off this indebtedness at once?

Mr. North: I object to that as immaterial and irrelevant, your Honor.

The Commissioner: I am going to overrule the objection.

A. I went up and had numerous conversations with Mr. McFaul, off and on, and sometime, I would say about the middle of 1939, thereabout, I had a talk with him. He said, 'We are anxious to get this cleaned up. If I could, I would almost give it to you. I want to get it out of here.' I said, 'I will see what I can do. I am pretty sure I can borrow some money.' I had a chance before to borrow some. I went up and told him I could borrow $18,000.00. At that time he did not want to accept it. He said, 'If you can get $15,000. I will try to put the thing through for you and get it cleaned up,' and he said 'Let's do it before the first of the year.'

Q. Subsequently the obligation was transferred by McFaul to the present holder? A. About the first of November I thought I would go up and have a further talk with Mr. McFaul, and see what he was planning, and I got up to his office, and found Mr. Robison in with him.

Q. Do you mean Mr. Robison here in court? A. Yes.

Q. Was he with the Bank Commissioner at that time? A. No, sir.

Q. What concern was he with then? A. So far as I know, he was with this Mr. Merritt. He and Mr. Merritt were up there at the property together.

Mr. North: I object, your Honor, as being irrelevant and immaterial. If Mr. Von Herzen wants to know, wants it in the record, Mr. Robison was originally with the Pan-American Bank, and then he liquidated the Pan-American Bank with the Superintendent of Banks, and then became identified with the Pacific States Corporation. I will so stipulate, if you desire.

Mr. Von Herzen: I understood Mr. Ewing liquidated the Pan-American Bank.

Mr. North: Mr. Robison was assistant to Mr. Ewing at the time.

The Commissioner: You won't accept the stipulation, Mr. Von Herzen?

Mr. Von Herzen: I think with that correction we will. Mr. Ewing was there about eight or nine months. He was assistant to Mr. McFaul, I take it.

Mr. Hughes: Maybe we can agree, Mr. North, to change that a little. Your stipulation implied that Mr. Robison completely liquidated it. My understanding is he had left the employ of the State some time before the liquidation was completed, and Mr. McFaul completed it.

Mr. North: That is correct, Mr. Robison?

Mr. Robison: I left the State Banking Department on September 1, 1935.

Mr. North: The Pan-American Bank was not completely liquidated?

Mr. Robison: All depositors were paid one hundred cents on the dollar when I left.

The Commissioner: You are getting off your stipulation, gentlemen. This is very important.

Mr. North: Mr. Robison was at one time with the Pan-American Bank. In the beginning he was also connected with the Superintendent of Banks' office, and then he later was connected with the Pacific States Corporation, this creditor; I presume that is what you want to bring out. I offer to so stipulate.

Mr. Von Herzen: Without the presumption, I will accept the stipulation.

The Commissioner: Very well."

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[Rep. Tr. p. 313, line 25, to p. 314, line 10]:

"Q. That was about 1915? This is all subject to correction, if we do have to correct it. That was when you got the ranch?

Mr. Von Herzen: Half of it, your Honor.

The Commissioner: Half of it. When did you buy the other portion? A. Shortly after.

Q. The same year? A. Well, the same year, or the next year.

Q. We will say then in 1916, you bought 116 acres? A. No, I bought 1560 acres.

Q. What was in the original ranch? A. 1320 acres."

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[Rep. Tr. p. 322, line 24, to p. 323, line 5]:

"Q. What do you think the property is worth today? A. About $80,000.00 now.

Q. Has the bank got any idea on that? A. I have never seen it.

The Commissioner: Has the Pacific States got any idea?

Mr. North: We believe it is worth about $50,000.00 or $55,000.00."

* * * * * * * * *

[Rep. Tr. p. 323, lines 11 to 23]:

"Q. You say today you think it is worth about $80,-000.00? A. I think so, the way things have been.

Mr. North: There have been about 500 acres sold off, your Honor.

The Commissioner: Are you talking about the balance, the residue? A. Yes.

The Commissioner: When you say $50,000.00 or $55,000.00, you are talking about the residue?

Mr. North: Yes, your Honor.

The Commissioner: That is your guess as of today?

Mr. North: Yes."

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Direct Examination.

By Mr. Von Herzen, February 19, 1943. [Rep. Tr. p. 406.]

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[Rep. Tr. p. 429, lines 5 to 16]:

"Q. Some question may exist, Mr. Hall, with respect to your ability to handle this transaction. Have you got some sales pending, such as the ones, for example, Mr. Munz testified to? A. Yes, sir.

Q. Roughly speaking, what is the total amount of sales that you have available at this time on the ranch, in money? A. $50,000.00.

Q. Approximately how many acres will you have left after the completion of those sales? A. Well, I would say approximately 700 or 750."

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Re-called for further Examination by the Commissioner. [Rep. Tr. p. 455.]

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[Rep. Tr. p. 456, lines 8 to 22]:

"Q. By the Commissioner: Do I understand from you, Mr. Hall, that if these sales went through you would have about 700 or 800 acres left? A. Somewhere between 700 and 800 acres.

Q. And what do you think that land is worth an acre? A. Well, it will vary, every piece pretty nearly.

Q. Of the 700 or 800 you have left, what would that be worth? A. I said I thought $30,000.00 would be bottom for it. Maybe it is worth more than that. It depends upon how much time and effort is taken to sell it.

Q. In other words, the remaining 700 or 800 acres would be worth about $30,000.00? A. Yes, I would say from $30,000.00 to $35,000.00."

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O. E. Horstmann called as a witness on behalf of Pacific States Corporation, October 4, 1943. [Rep. Tr. p. 517.]

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Direct Examination by Mr. North.

[Rep. Tr. p. 517, line 20, to p. 518, line 9]:

"Q. By Mr. North: Mr. Horstmann, you are employed by the Citizens National Trust & Savings Bank of Los Angeles? A. Yes, sir.

Q. I believe you stated here before your position in that bank. Will you please state it and your connection with this Trust 5873? A. Clerk.

Q. In connection with your duties in the Citizens National Trust & Savings Bank of Los Angeles you have supervision or charge of this Trust 5873? A. I do.

Q. Can you tell us how much the principal on that note in that trust is due and is unpaid? A. Yes, sir. Unpaid principal, $23,921.52.

Q. $23,921.52? A. That is correct."

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Mr. Sondel on *voir dire*. [Rep. Tr. p. 519, lines 13 to 21]:

"Q. For the purpose of the record, Mr. Horstmann, when did you become employed in the trust department of your bank? A. October 7, 1922.

Mr. Sondel: When was the first time you had participated in the affairs of Trust 5873? A. By that you mean the administration of the trust itself?

Mr. Sondel: That is right. A. The early part of 1942."

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Direct Examination Resumed. [Rep. Tr. p. 569.]

[Rep. Tr. p. 589, lines 8 to 22]:

"Mr. North: Now, if your Honor please, the Court has ringing in your ears the statement that since 1932 the bank has made no statement and made no computation of interest, to the effect that the bank has disregarded entirely all mention of any interest whatever on this debt since 1932. I think it would be remiss on my part if I permitted your Honor to go any further in this hearing without referring to the statement which forms part of Pacific States' Exhibit 2-A, and in that statement from 1928 to 1938 there are regular statements of interest.

(Discussion.)

Mr. North: I want to ask Mr. Horstmann this question: Was there any enclosure went with the letter to Mr. Hall dated October 8, 1942 and being a part of one of those letters in Pacific States' Exhibit 2-A?"

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[Rep. Tr. p. 590, line 19, to. p. 593, line 2]:

"Mr. Sondel: Yes, we received that copy.

Mr. North: All right. Then that enclosure was received with that letter, and I offer in evidence this enclosure. It is this enclosure that I make reference to in my remarks here.

(Discussion.)

The Commissioner: I am going to overrule the objection, because I would like the document attached to this exhibit which it refers to. It gives me a more intelligent picture of what was done at that time and what the position of the Trustee was at that time.

Mr. Sondel: May I ask the witness some questions in regard to that on *voir dire?*

The Commissioner: I will mark it for identification as 2-AA and attach it to the Exhibit 2-A, for identification. Then after the *voir dire* examination you can make such disposition as you wish with respect to the exhibit.

Q. By Mr. Sondel: Mr. Horstmann, to your knowledge is there any bookkeeping record from which the separate items reflected on this Exhibit 2-AA for identification was copied? A. Certain items were; yes.

Q. My question is, was there a bookkeeping record from which these items were copied? A. I say certain ones were; not all of them.

Q. Do you have any bookkeeping record from which shows that on March 29, 1928 the principal sum was $45,811.92? A. No; I can't show you that.

Q. Do you have any bookkeeping record which shows the unpaid balance in accordance with any items under the last column of page 1 of this exhibit? A. No, I do not.

Q. Do you have any records of any kind which will show the figures on any line in any part of the last column, designated 'Unpaid Balance,' shown on page 2 of this exhibit? A. No.

Q. Do you have any bookkeeping record of any kind which will show the unpaid balance as reflected on any part of page 3 of the last column? A. No.

Q. Do you have any bookkeeping record of any kind which will reflect any of the items appearing on the last column on page 4, as the unpaid balance? A. No.

Q. Do you have any such records for page 5? A. No.

Q. Do you have any records for page 6? A. No.

Q. Do you have any records for page 7? A. No.

Q. Do you have any records for page 8? A. No.

Q. I will now ask you if you know from your own knowledge on what date, in respect to the transmittal letter, the computations shown on Exhibit 2-AA for identification were made? A. From my own knowledge I do not know the exact date."

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[Rep. Tr. p. 596, line 16, to p. 597, line 2]:

"Q. I call your attention, then, on Exhibit 2-AA for identification, you show on October 30, 1939 an indebtedness of $47,078.32 as the unpaid balance, and on January 30, 1940, $47,902.19; is that correct? A. That is correct.

Q. I will ask you to show me any bookkeeping records of your bank reflecting these last two payments? A. There are none.

Q. And there never have been any, have there? A. There have not.

Q. And you can't tell us, can you, who prepared that document? A. No."

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[Rep. Tr. p. 597, line 21, to p. 600, line 6]:

"Q. By Mr. Sondell: Did you have anything to do with the preparation of that document? A. I did not.

Q. Did you at any time check any of those figures? A. No, I did not.

Q. Did you at any time make any investigation to determine the source of the information from which any of the data included in that document was prepared? A. No.

Q. Did that document ever come into your possession? A. Copies of it.

Q. And from whom did you receive them? A. From our accounting division.

Q. From whom? A. The exact party I do not know.

Q. And when did you receive them in respect to October 8, 1942? A. Just prior to the date that they were mailed to Mr. Hall, I presume.

Q. How long prior? A. The exact number of days I am not familiar.

Q. Within a month? A. Oh, yes. Within days, I would say.

Q. So that prior to a month you had never heard of the existence of any of that information, had you? A. No.

Q. A month, I am giving you leeway. A. Approximately a month is what you mean.

Q. Approximately a month prior to October 8, 1942? A. Yes.

Q. When that was prepared a copy was given to you and the bank made no effort, to your knowledge, to make any bookkeeping record of that, did it? A. No.

Q. In other words, these items were never reflected in any permanent records of the bank? A. No, they were not.

Q. So that if at any time Mr. Hall or Mrs. Hall, or anybody who had the right to an inspection of your documents, would have come to your bank and asked to see the unpaid balance of principal, you, or whoever had charge

of the books, would show him ledger sheets similar to 2-10? A. Correct.

Q. And the sheet would be the sheet which would show the date applicable; is that correct? A. Correct.

Q. In other words, assuming Mr. Hall came to your bank on March 18, 1938 and wanted to know the unpaid balance, you would have shown him the unpaid balance as reflected in Exhibit 2-10 for that date? A. That is correct.

Q. And that same situation would apply for all periods prior to 1932 and subsequent to 1932, would it not? A. That is correct.

Q. And if Mr. Hall or anyone interested should have come into your bank on January 1, 1936 and said, 'What is the accrued interest owing or unpaid?' was there any record of any kind in the bank which could have been used to convey that information? A. There were not.

Q. And your answer would apply to any other date subsequent to the date of maturity of the note, would it not? A. That is correct."

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C. M. MacFarlane, called as a witness on behalf of Pacific States Corporation, being first duly sworn, testified as follows: (October 4, 1943—2:00 P. M.) [Rep. Tr. p. 537.]

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Direct Examination.

[Rep. Tr. p. 537, line 10, to p. 541, line 26]:

"Q. By Mr. North: Mr. MacFarlane, you are assistant trust officer of the Citizens National Trust & Savings Bank of Los Angeles? A. Yes.

The Commissioner: Just a minute, Mr. North. Were you going into this document? I merely want this document now introduced by one of you and a proper foundation laid. I want it marked, with the understanding that a photostatic copy is going to be furnished, and I want Mr. MacFarlane to lay a foundation for the introduction of the document.

Mr. North: All right.

The Commissioner: Mr. MacFarlane, we had a ledger sheet here a minute ago from the records of the Citizens Bank. You have it in your hand. It refers to this note of $45,000.00 principal and it shows a purported balance in the sum of $23,921.52. Is this the original sheet taken from the records of the bank in this matter? A. Yes, sir.

The Commissioner: I understand you are introducing the document?

Mr. Sondel: That is right.

The Commissioner: Then you have made an objection to it on the ground that no proper foundation has been laid and on the ground that it is incompetent, irrelevant and immaterial; is that correct?

Mr. North: Yes, sir.

The Commissioner: Objection overruled. Will it be satisfactory with you if I put my identification stamp here some place on the document, then we will photostat it and it will take the identification number?

The Witness: Can you put it above the heading?

The Commissioner: Yes, I can.

Mr. North: I also make the objection that the sheet that is offered in evidence is not binding upon the Pacific States Corporation.

The Commissioner: I have already ruled, Mr. North.

Mr. North: I wish to insert that additional objection.

The Commissioner: Very well. I have overruled your objection. This will be Debtor's Exhibit 2-10, but the stipulation is that this document may be withdrawn and a photostatic copy put in its place. I will hand the document back to the witness and turn the examination back to you.

Mr. Von Herzen: Your Honor, I don't have any notation here of this document being prepared under Mr. MacFarlane's supervision and direction. I assume that probably was meant to be included in the fact that he was assistant trust officer and accountant.

The Commissioner: Well, I didn't go very far in laying a foundation. If you think you haven't got enough in the record to establish it, you can ask him.

Mr. Von Herzen: I think I should.

The Commissioner: Very well. Ask whatever questions you want.

Q. By Mr. Von Herzen: Mr. MacFarlane, as assistant trust officer of the bank are you the accountant in charge of this particular trust and the entries made on

this particular sheet? A. I have supervision of all accounting.

Q. And that particular sheet and the entries made thereon were made under your supervision and direction? A. That is right.

Q. And you are in charge of all the accounts? A. Yes.

Mr. Von Herzen: That is all.

Q. By Mr. North: You have been in that position since 1928, have you? A. Approximately, yes. That is my recollection. It is about that time.

Q. Did the bank, as Trustee of 5873 ever receive any portion of that $727.70?

Mr. Sondel: I object to that question unless the witness can testify of his own knowledge and not from hearsay or a conclusion. I object to it for the further purpose that the document cannot be impeached in this manner.

Mr. North: If he is competent to testify to the authenticity of the last exhibit he certainly is competent to answer this question.

The Commissioner: I don't think that argument necessarily follows, Mr. North.

"Do you know of your own knowledge that the bank received the item of $727.70 on or about the date that the entry bears in the ledger sheet? A. The bank did not receive it.

Mr. North: Well, the question that was asked was: Did it receive it on that date? Your answer is, 'No'? A. The answer is, no.

Q. Did they receive that amount or any portion of that amount on any other time? A. No.

Q. Will you tell us, please, the amount of principal and interest that is due upon this note, according to the records of the bank?

Mr. Sondel: I object to that, if your Honor please, as calling for the conclusion of this witness.

The Commissioner: Read the question back, Mr. Reporter.

(Question read by the reporter.)

The Commissioner: Objection sustained. It calls for the conclusion of the witness. What we want to know is not his interpretation of the note. That is the thing that the Court has to decide.

Mr. North: All right. We have stipulated that a certain amount of principal was due on a certain date, that date was June 29, 1940, the principal being $23,921.52 due on the 29th day of June, 1940.

Q. Tell us whether or not any amount of principal has been paid on this obligation since that time. A. The ledger sheet entry doesn't show any, and of my knowledge I don't know.

The Commissioner: May I ask a question? This exhibit, Debtor's Exhibit 2-10, is that the only ledger sheet upon which the payment of principal and interest are noted in regard to this note? A. No; it is a continuation thereof.

The Commissioner: It is a continuation? A. Yes. Until February 18, 1935, when the balance as showed by the mortgage showed $29,990.49, at that time our accounting system was changed to a machine system and the balance of $29,990.49 was used as the opening entry on the new ledger sheet.

The Commissioner: That date was what? A. That was February 18, 1935."

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[Rep. Tr. p. 661, line 19, to p. 662, line 9]:

"Q. By Mr. North: Now, Mr. MacFarlane, various statements of this trust 5873 were prepared from time to time and sent to the debtor, and those various statements, or at least many of them, are in evidence here. You are acquainted with those statements? A. They were made under my general supervision.

Mr. North: None of those statements contain items of interest on this note.

Mr. Von Herzen: That is incorrect.

Mr. North: He didn't make them. Strike the last question.

Q. By Mr. North: I hand you Debtor's Exhibit 2-4, containing ten statements, and you will notice that in many of those statements, if not all of them, or many of them at least, there are no designations of interest. A. I am familiar with these statements.

The Commissioner: You say you are familiar with them? A. Yes."

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[Rep. Tr. p. 664, lines 5 to 9]:

"Q. By Mr. North: I have shown you Exhibit 2-4, consisting of various statements of the bank, copies of which were sent to Mr. Hall. Why was reference to interest omitted from those statements between 1932 and 1938? A. I don't know."

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[Rep. Tr. p. 667, lines 3 to 9]:

"The Commissioner: In other words, can you do that; can you tell us why the statements as to interest are not included in these ten documents? A. I had already answered that, had I not, before we adjourned?

The Commissioner: That you couldn't do it? A. That is right."

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[Rep. Tr. p. 673, line 13, to p. 675, line 5]:

"The Commissioner: All right. That last part may go out. I will sustain the motion. I am calling your attention, Mr. MacFarlane, to the last page on the statement of January 1, 1933, to June 9, 1933, which discloses the unpaid principal balance, as of 12/31/32, of the sum of $33,557.65. Is it your interpretation that that is the unpaid principal balance as of that date? A. As far as the statement is concerned, that is a memorandum as to—

The Commissioner: That is not the true figure? A. Yes, it is the true figure, but the memorandum doesn't appear in trust 8573. It is the amount of assets carried in trust 5902. I put on that statement as a memorandum.

Mr. Sondel: I move that that last part be stricken, if the court please, as purely a voluntary statement of this witness, and an attempt to vary the terms of a written instrument, not an explanation or interpretation of the document.

The Commissioner: Overruled. Do you know whether or not this is a copy of the statement sent to Mr. Hall in regard to the operation of this trust 5873? A. It is a statement that should have been sent to him. In other words, it was a statement prepared from the books, and, under my general instructions, that statement should have been sent to Mr. Hall personally. I don't know whether it was sent or not.

The Commissioner: Did you prepare any statement outside of this statement at that time? A. No.

The Commissioner: So that I may understand you, again referring to this figure of $33,557.65— A. That is a statement of the obligation of trust 5873.

The Commissioner: To whom? A. To the Pan-American bank. An obligation is not set up on the trustee's books—it is set up when it appears as an asset of another trust, as an asset of that trust, trust 5902. The whole of the corpus of trust 5902 consisted of that note, and that is put on merely as a memorandum entry.

The Commissioner: It is the entire corpus of 5902? A. Yes.

The Commissioner: So that this balance of $33,557.65 was the unpaid balance of the note which constituted the corpus of 5902? A. Yes."

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[Rep. Tr. p. 678, line 5, to p. 681, line 1]:

"The Commissioner: Having examined the statements now in Debtor's Exhibit 2-4, do you find indicated any place on any of the statements a payment on account of interest due on the balance of the principal obligation? A. I understand the question, but there are two that I haven't examined yet.

Mr. Sondel: In order to complete the record, I might hand the witness this other one, for that other period.

The Commissioner: Yes.

A. The answer is no.

Mr. Sondel: Here is one more that isn't in that bunch.

A. The answer is no.

The Commissioner: I will ask the further question, whether any place upon the face of those documents is shown the interest accrued? A. No, sir.

The Commissioner: Very well. Gentlemen, I have finished with my questions.

Q. By Mr. North: Mr. MacFarlane, why do those statements not show the interest accrued?

Mr. Sondel: I was just going to direct the witness' attention to that last statement and give him an opportunity to correct his answer, if he cares to.

The Commissioner: Do you contend that it shows otherwise?

Mr. Sondel: The sheets from January 1, 1940, to December 31, 1940, have one entry of $363.85.

The Commissioner: I think he should be allowed to correct his answer. Call that to his attention, if you will.

Mr. Sondel: I want to do that, so that Mr. MacFarlane will have an opportunity to correct his answer.

Mr. North: I don't think it will prove to be a correction your Honor, but he has a right to explain it.

The Commissioner: We discussed this item before. I remember this item.

The Witness: That is all right. I saw that. It is not part of the statement. The money never passed through our hands. It is an explanatory entry.

Mr. Sondel: I just wanted to give the witness an opportunity, by calling attention to that item, is all.

The Commissioner: All right. Did you examine it again? A. Yes, sir.

The Commissioner: I understand him and he understands you. Proceed, please. Mr. North, we are back to you now.

Q. By Mr. North: Why do those statements not show interest accrued?

Mr. Sondel: That is objected to as argumentative, and an attempt to explain the terms of an unambiguous written instrument, and it calls for this witness' conclusion.

Mr. North: Your Honor realizes the purpose.

The Commissioner: Just a minute. I haven't asked for any argument on this yet. I think now is the proper time for the court to satisfy its curiosity, so I will overrule the objection and allow the answer to come in, and then I will be very glad to entertain a motion to strike later, if you wish. The objection is overruled. You have the question in mind? A. Yes, sir.

The Commissioner: You may explain it, please.

A. The trust department of the Citizens Bank is maintained strictly on a cash basis. No items of accrual are entered on the records.

The Commissioner: Have you finished the answer? A. Yes, sir.

Mr. Sondel: I now move to strike the answer, if the court please, as being purely a voluntary statement of this witness, a conclusion, and an attempt to impeach a written document by a statement of private practice and custom and procedure of a bank, not communicated to the debtor, and not binding upon him.

The Commissioner: I am going to deny the motion to strike. Maybe Mr. North is going to have to do some arguing after while to explain his position. I am leaving it in because I want to get the information, and the witness is very frank. Now we will have to argue upon the effect of that later on. I do not consider it highly important at this time."

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A. Q. Robinson—recalled for further examination, having been previously duly sworn, testified as follows:

[Rep. Tr. p. 621.]

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[Rep. Tr. p. 621, lines 11 to 24]:

"Q. By Mr. Sondel: Mr. Robison, after the Pacific States acquired the note in that deal of November 1939 the Pacific States or you received the subsequent copies of the Citizens Bank's statements, did you not, such as Debtors' Exhibit G for the period from January 1, 1939 to December 31, 1939 and the one from January 1, 1940 to December 31, 1940? A. Yes; we received that one.

Q. That one; referring to the period from January 1, 1939 to December 31, 1939? A. Yes; we received both of them.

Q. The later one being the one for the period January 1, 1940 to December 31, 1940? A. Yes."

* * * * * * * * *